In the Supreme Court of the United States

OCTOBER TERM, 1938

SUNSHINE MINING COMPANY,
a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Sunshine Mining Company prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered on April 3rd, 1940, granting the petition of Respondent for the enforcement of its order against Petitioner.

OPINIONS BELOW

The original findings of fact, conclusions of law, and order of the Board (R. 214-258) are reported in 7 N.L.R.B. 1252. The opinion of the Circuit Court of Appeals (R. 3191) is reported in 110 F. (2d) 780.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on April 3, 1940 (R. 3228). A petition for rehearing filed by Petitioner was granted June 7, 1940 (R. 3233). The decree was confirmed without specification of reason June 19, 1940 (R. 3235). The jurisdiction of this Court is invoked under Title 28 U.S.C. § 347, and Sections 10(e) and (f) of the National Labor Relations Act, Title 29 U.S.C. § 160.

TERMINOLOGY

In this petition and supporting brief the National Labor Relations Board will be referred to as "Board"; the Sunshine Mining Company as "Petitioner", "employer", or "Idaho Mine"; the International Union of Mine, Mill and Smelter Workers as "Union" or "International Union"; Wallace Miners Union No. 14 as "Local 14", Kellogg Mine and Smelter Union No. 18 as "Local 18", and the two locals as "two locals"; the Bunker Hill and Sullivan Mining & Concentrating Company as "Bunker Hill" or "purchaser"; the Big Creek Industrial Union as "Big Creek", and the National Labor Relations Act as "Act."

All italics are supplied unless otherwise noted.

QUESTIONS PRESENTED

1. Whether the labor relations of Petitioner mining company with its production employees are subject to the Act, when some of the supplies and materials purchased by the company (which supplies and materials form no part of

the ore produced), come from sources outside the state, and when it locally mines, sells and delivers its ore to an independent company which, within the same state mingles the ore with other ores, at a much later time smelts and refines such ores, and finally sells and ships the metals produced from them to its customers outside the state.

2. Whether the Board, when attempting to exercise jurisdiction over an activity which, when separately considered, is local and intrastate, is required to find as a fact, based upon substantial evidence in the record, that a labor disturbance in such local activity would necessarily result in an immediate, direct and substantial diminution of the shipment of goods in interstate commerce or some interruption in the movement of goods or articles across state lines, and if so, whether the Board made such finding.

3. Whether Petitioner is deprived of due process of law by the enforcement of a final order of the Board which found Petitioner guilty of an unfair labor practice in refusing to recognize and bargain with the International Union as the exclusive representative of a unit of its employees called "mine and mill employees" (less certain excluded groups), when the record shows that no claim or demand was made by such Union to represent such unit, and no charge or complaint was filed, issue raised, evidence received or notice given with reference to that Union, or to that unit.

4. Whether there is substantial evidence to support the Board's findings as to the proper unit, majority representation and refusal to bargain.

5. Whether, upon the record, the Board on July 1, 1938, and the Court on April 3, 1940, acted arbitrarily, and abused their discretionary power to order affirmative relief to effectuate the policies of the Act in ordering Petitioner to reinstate all employees who went on strike on August 2, 1937, with back pay from August 18, 1937.

6. Whether the entry of a final order on July 1, 1938, requiring reinstatement of all employees who went on strike, with back pay from August 18, 1937, was an abuse of the Board's discretion because the commencement of the back pay was not postponed until the date of service of the Board's order.

7. Whether employees, who went out on strike solely because their employer refused to recognize a Union as the exclusive bargaining agent for all its employees and to enter into a contract with such Union covering all of its employees, remained employees under the Act, whose reinstatement could be ordered, when the Union in fact did not represent a majority of the employees in such unit, to-wit, of all the employees.

8. Whether Petitioner, who in good faith and upon reasonable grounds doubted the applicability of the Labor Relations Act to it, and raised the question of the Board's jurisdiction at every opportunity, was deprived of due process of law by an order of the Board, ten to twelve months after the act complained of, assessing a penalty in the form of back wages which may amount to over $300,000.00, where

the Act prohibited Petitioner from obtaining a judicial determination of the applicability of the Act to it, until after the Board had issued its final order.

9. Whether the Board and the Court erred in ordering Petitioner to bargain with the Union when, as the record conclusively shows, at the time of the hearing before the trial examiner an overwhelming majority of Petitioner's employees were not members of nor had designated the Union as their representative, but, on the contrary, had repudiated the Union in writing, had joined another union, and had designated the other union their bargaining agent.

10. Whether the Board and the Court erred in ordering Petitioner to enter into a written contract with the Union.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, 29 U.S.C. 151, et seq., and the pertinent provisions of the Rules and Regulations of the Board are set forth in the Appendix, infra., pp. i to viii.

STATEMENT

1. JURISDICTION

Petitioner is engaged in subsurface mining near Kellogg, Shoshone County, Idaho, (R. 218), employing about 600 men and women. The crude ore produced is crushed and milled, by which process a large part of the non-mineral rock is eliminated (R. 218, 1948, 1946). All ore is sold to the

Bunker Hill (Bd. Ex. 10-P, R. 365, 219, 334-5, 1947, 1925, 1940-1) and is delivered to it at Bradley, Shoshone County, Idaho, (R. 1925-6, 1948, 335, 385-6). Upon receipt the ore is weighed, tested and assayed; the results of the analysis are applied to the contract (Bd. Ex. 10-P, R. 365, 374-6, 1961); and a final settlement sheet is prepared. Petitioner is immediately paid 75% of the purchase price; within 30 days it is paid the balance (R. 1948-52, 1926-30, 219-21).

Immediately after sampling ,the ore is taken by the purchaser to its mill at Kellogg and remilled (R. 1952-3, 1959, 1929, 218). Thereafter the remaining concentrates are taken to bins of the purchaser and there mingled with other ore and concentrates (R. 219) either mined by the purchaser itself (R. 3089), or purchased by it from numerous other mines within and without Idaho (R. 387, 1947, 1954). All identity of ore purchased from Petitioner is then lost (R. 1927-8, 1953-4). These concentrates remain piled up in the purchaser's bins for from one to six months or longer (R. 1956, 1958, 1960, 1931). Thereafter the Bunker Hill, by a complicated process including numerous physical and chemical changes, and taking about three weeks (R. 348), produces a comparatively small quantity of metallic end products. In this process at least 80% of the concentrated ore is consumed leaving not more than 20% of the weight of the original ore in the form of a salable product (R. 2928). Finally, the lead and copper products remain in stock for two to three months longer (R. 1943). In other words, 6 months may elapse after purchase and receipt by the smelter before

the ore is manufactured and refined, 3 weeks more before the refining process is completed, and 3 months of storage before the final products are sold and shipped in interstate commerce, or a total of 9 2/3 months after the Bunker Hill purchases and receives the raw ore, until it finally ships the end products created by it through the smelting and refining process.

From the moment it receives the ore from Petitioner, all risk of loss and all risk of price change, is on the Bunker Hill (R. 1930, 1933, 1942-5, 1958-60). It owns the ore. Petitioner has no way of knowing how much of the metal which is actually produced from the commingled mass of ores comes from ore purchased from Petitioner, nor what happens to the metal, nor how much it was sold for, nor where it was sold (R. 1930, 1944, 1955, 1957-8). The identity and ownership of all such ore is completely outside its knowledge or interest.

The Bunker Hill's total purchases and receipts of raw material, i.e., ore, in 1937 are shown by Board's Exhibits 12-E, 12-F, 12-G, and 12-H. In May it purchased and received 176 cars (Bd. Ex. 12-E, R. 3049), in June, 204 cars (Bd. Ex. 12-F, R. 399), in July, 199 cars (Bd. Ex. 12-G, R. 400), and in August, 230 cars (Bd. Ex. 12-H, R. 3050). In other words, in August, the month of the strike, it purchased and received 54 cars more than in May, 26 more than in June, and 31 more than in July. Its purchases from Petitioner varied in tonnage from 571 tons in June, 1936, to 1024 tons in October,

1936 (Br. Ex. 10-F, R. 358), and in August, 1937, it purchased and received more ore from Petitioner than it did in any of the first six months of 1936 (Bd. Exs. 10-C, 10-F, R. 356, 358).

The amount of raw material processed, treated and refined by the Bunker Hill varied between 10 to 15 thousand tons a month (R. 1945), the variation undoubtedly depending upon the condition of the market.

In August and September, 1937, the months including and following the strike, Bunker Hill's sales of its products were greater than usually was the case (Bd. Ex. 10-H to 10-O, R. 359-64), and there is no evidence of any effect, direct or indirect, close or distant, minute or substantial, of Petitioner's operations upon the interstate commerce activities of the Bunker Hill or anyone else.

With reference to purchases of materials by Petitioner, the only finding the Board made was that in 1936 Petitioner "purchased supplies, equipment, electrical current, machinery, and other materials used in its operations amounting to approximately $700,000.00. Approximately 60 per cent of these purchases came from sources outside the State of Idaho" (R. 221). The trial examiner added: "and are generally shipped to respondent F.O.B. Kellogg, Idaho" (R. 134).

The record shows that these purchases were 17 cars of coal, 6 cars of grinding balls, 43 cars of building materials, 19 cars of powder, and 2 cars of machinery (Bd. Ex. 15-B, R. 407-410), most of these materials going into permanent improvements to the mine (R. 2763). The electrical energy

was purchased f.o.b. the power company meter panel at the mine (R. 2762). None of the purchases became any part of the product sold to Bunker Hill (R. 1466), and of course none of them formed any part of the end products made and shipped out of the state by it, and did not go into and could not affect interstate commerce in any way whatsoever (R. 1466). All purchases were used by Petitioner at the mine at Kellogg, Idaho (R. 1465-6) in the operation and equipment of its plant.

2. PROCEDURAL DUE PROCESS AND LACK OF SUBSTANTIAL EVIDENCE OF MAJORITY

On June 28, July 9 and August 2, 1937, a committee of nine men visited Petitioner, three representing Kellogg Local, three the Wallace Local, and three the Union (R. 434-5, 442), and presented their demands in the form of a prepared written contract (R. 436, Bd. Ex. 19, R. 448-52), which was a demand by the Union to represent "all of the employees of the Company" (Bd. Ex. 19, R. 450, 437). It was to cover the "wages, hours of labor and other conditions of employment, of *all men employed in and about the plants of the Company in the vicinity* of Big Creek, Shoshone County, Idaho" (Bd. Ex. 19, R. 448-9). This included all of Petitioner's employees who were eligible for membership in the Union (Bd. Ex. 59, 1179-80), and attempted to put in effect the closed shop and check-off. It was the only demand or request ever made, and was never receded from (R. 496-7).

Petitioner doubted that the Union had a majority of the

employees, and so told the committee (R. 437, 473, 493, 2826, 2813, 2868, 2875). The members of the committee then offered to turn their books over to the Board if the Petitioner would agree to abide by its findings (R. 437, 493). No other offer was ever made.

Petitioner contended that the Act did not apply to it because it was neither in nor affecting interstate commerce (R. 493). It had so told the Board (Resp. Ex. 101-3, R. 2911-15). After the conference on July 9, 1937, when Petitioner again doubted Union's majority of *all* the employees, the Union filed a petition with the Board for certification as the Bargaining agent of *all* of Petitioner's employees (R. 446, 2902). This petition was never acted upon by the Board.

Shortly thereafter a Board representative, Mr. Daniel Baker, who had previously corresponded with Petitioner (Resp. Ex. 98, R. 2909), came to Kellogg to investigate the charge filed in June and the certification petition. (Baker later signed the amended charge (R. 5) and appeared as counsel for the Board in the hearings). After investigation he discussed the matter with Petitioner, informing it of the charge and the petition for certification. He agreed with Petitioner that there was a question of jurisdiction and told it that there was no use doing anything about the charge until the question of jurisdiction was settled (R. 2902-3); that with reference to the petition for certification, two courses were open. Petitioner could either agree to a consent election, or have the matter determined by the Board's regular procedure.

Petitioner elected to have the Board follow its regular procedure (Resp. Ex. 76, R. 2839-40), and a strike followed on August 2, 1937.

After the strike, on August 28, 1937, the Union filed an amended charge alleging:

> "That the said Company has continuously refused to recognize and to negotiate with a joint committee of Locals 14 and 18 of the . . . Union . . . as the sole and exclusive bargaining agency for *all its employees,* although said joint committee has been designated by a majority of its employees as the representative of said employees . . ." (R. 4).

On September 3, 1937, the Board issued its first complaint, alleging not that the appropriate unit was *all* the employees, as stated in the charge, but that it was "all the employees" *except "supervisory officials, executives, technicians, office employees"* (R. 10). It further alleged that a majority of the employees in such unit had "designated and selected said *Locals 14 and 18, jointly,* as their representative . . ."; that "Locals 14 and 18 have been constituted and now are jointly the representative . . ."; that "said Locals, acting through a Joint Committee, duly selected by the membership for that purpose, requested the respondent to bargain . . . with said Locals acting jointly as the exclusive representative of all the employees in said unit"; and that Petitioner "refused and does now continue to refuse to bargain collectively with the Joint Committee of said Locals 14 and 18 as the exclusive representative of all the employees in said unit" (R. 11-12).

Petitioner objected to the jurisdiction of the Board and moved to dismiss the complaint (R. 51-4, 26-7), and in its answer admitted that the proper unit was *all* its employees, excluding only supervisory officials and executives (R. 30). This was an admittedly appropriate unit (Sec. 9(c) and 2(c) of Act, R. 237), and all Petitioner's employees in such unit were eligible for Union membership (Bd. Ex. 59, R. 1179-80). Petitioner denied that a majority of all its employees in the unit *defined in the complaint* had designated the Locals as their representative (R. 31), denied that said Locals or any committee thereof had ever requested bargaining rights for the employees in such unit, and alleged that such locals did not represent a majority of the employees in such unit (R. 32).

The principal issues for the hearing were thus determined. They were whether the technical and office employees, as well as the supervisory officials and executives, should be excluded from the bargaining unit of "all the employees"; whether a majority of the unit of "all the employees", less the aforementioned excluded groups, had selected the two local unions jointly as their representative for bargaining purposes; and whether the two local unions jointly had demanded and been refused bargaining rights for such unit.

The evidence on those issues is: The claims of the two locals and the International Union as to membership or designation by Petitioner's employees are shown in Board's Exhibit 51 (R. 1005) and Exhibit 52 (R. 1034); the only ev-

idence as to the total number of employees in the unit in controversy at that time is contained in Board's Exhibit 54 (R. 1043), Exhibit 54A (R. 1158) Exhibit 55 (R. 1063), Exhibit 56 (R. 1082), and Exhibit 57 (R. 1106). Except for Exhibit 54A which lists the supervisory officials and executives, technical and office help, these exhibits show Petitioner's employees without classification as to kind or type of employment.

After the hearings were completed, the Board filed its amended complaint to conform to the proof (R. 2956-8), in which the allegations with reference to unit, representation and refusal to bargain were repeated verbatim (R. 85, 86).

The trial examiner's report shows that the only issues tried were those raised by the complaint as to the proper unit and the number of employees therein, that is, *all* of the employees, less the specified exceptions. The allegations of the complaint were repeated in the report (R. 98-99), which concluded that a unit of all the employees, excluding supervisory officials, executives, technicians, and office employees, was the appropriate unit (R. 124, 130). The examiner then determined the number of men in each local who were employees (R. 125), basing the computation upon the total payroll (R. 126), and found that Petitioner refused to bargain with the *two Locals* as the exclusive bargaining agent of all the employees in the unit in controversy (R. 129). The examiner also found that, at the same time, the *International Union* represented a majority in the same unit (R.

130), and that Petitioner had refused to bargain with it as the exclusive representative of all of the employees, excluding supervisory officials, executives, technicians and office employees (R. 131). The evidence is that the only request the International Union ever made was to represent and be recognized as the exclusive representative of *all* the employees (R. 496-7).

Included in the unit described in the Union's demand and in the *charge* filed against Petitioner, which the Board found was an appropriate unit (R. 237), were mine and mill workers, truck drivers, sawmill workers, assayers, carpenters, blacksmiths, surface workers (bull gang), shovel runners, machinists, warehouse workers, electricians, plumbers, watchmen, truck helpers, office workers, painters, engineers, samplers, stenographers, and accountants (Resp. Ex. 62, R. 2106, 855, 924, 1122, 1275, 1317), all of whom were eligible for Union membership (Bd. Ex. 59, R. 1179-80). (Exhibit 62, however, contains the names of only a few of the men who had gone out on strike and only a few of those claimed by the two Locals or the International.)

The unit described in the complaints and the trial examiner's report included all of the above except the office help, the assayers and engineers.

One year after the alleged first refusal to bargain, the Board found as follows:

> "We find that respondent's *mine and mill employees*, excluding supervisory, clerical, and technical employ-

ees, constitute a unit appropriate for the purposes of collective bargaining . . . " (R. 228).

The unit shrunk from "all employees" at the time of the refusal to bargain in June, July and August, 1937, and at the time the charge was filed on August 28, 1937, and from "*all* the employees", except "supervisory officials ,executives, technicians, and office employees," when the complaint was filed to conform with the proof in November, 1937, and when the intermediate report was filed in January, 1938, to only "the *mine and mill* employees, excluding supervisory, clerical and technical employees" in the Board's order. (Incidentally, the exclusion of "supervisory employees" is a much larger exclusion than "supervisory officials and executives.")

This is a unit which no one ever claimed to represent, a unit for which no one ever tried to bargain, a unit with reference to which no one sought to speak. Neither Petitioner nor anyone else ever heard of it until the Board's order on July 1, 1938. The Board found that Petitioner was guilty of an unfair labor practice in refusing to bargain with the Union as the exclusive bargaining agent of this Board-created unit, and that such refusal was the sole and only cause of the strike (R. 237, 244, 232).

The alleged representative of this unit—first it was the International Union, for all employees; then it was a joint committee of the two locals, for all the employees; then it was the two locals, for a few less than all the employees;

then it was all three, the International and the two Locals jointly for a few less than all the employees. Finally, by the Board's order, it was the International Union for only the mine and mill employees (less additional excluded groups).

The Board found that the Union represented a majority of Petitioner's employees in this unit (R. 233).

There is no evidence in the record as to who were the mine and mill employees, the number of Petitioner's "mine and mill" employees, or as to the number of mine and mill employees claimed by the Unions.

There was no finding and no evidence as to what types of employment or classification of employees were included in the phrase "mine and mill employees".

The Board attempted to cure the lack of evidence by deliberately misstating the membership requirements of the Union (R. 221-2). These requirements are shown by the Union's Constitution (Bd. Ex. 59, R. 1179-80), and they clearly make all of Petitioner's employees, except a few officials, eligible to membership in the Union. In order to make it appear, however, that the record showed the number of those of Petitioner's employees joining or designating the Union who were within the unit prescribed by it, the Board found, contrary to the only evidence in the case, that the Union's membership was limited to "mine and mill employees" (R. 221-2). Some of the Board's own witnesses whose names appear on Board's Exhibits 51 and 52, testified they

were members of the union but that they were not mine and mill employees (R. 855, 924, 1122, 1275, 1317).

3. BACK PAY AND REEMPLOYMENT

During the strike extreme ill feeling was generated between the strikers and the non-strikers, caused by the campaign of villification conducted by the strikers (R. 847, 2098-9, 2025, 2036, 2058, 2351, 2365, 2430, 2486-8, 2520, 2616, 2623, 2633-4). By reason thereof the non-strikers were violently opposed to the reemployment of the strikers (R. 1978, 2045, 2145, 2150, 2154, 2156, 2161, 2164, 2170, 2179, 2182, 2192, 2193, 2200, 2206-7, 2241, 2266-7, 2273, 2285, 2291, 2295, 2296, 2304-5, 2324, 2353, 2369, 2390, 2423, 2443, 2460, 2470, 2473, 2480, 2483, 2507-8, 2520, 2527-8, 2534, 2538, 2549, 2551, 2561-2, 2592, 2598, 2602, 2637, 2639, 2646, 2652, 2656, 2692, 2698, 2721-2, 2786). Some of the men didn't want them because of the names called; some were afraid to work with them; some wanted revenge; some expected violence. The strike occurred the first week of August, and this testimony at the hearing was given in late September and early October, before a cooling-off period had passed.

When the strike was over, Petitioner realized the feeling of the employees and waited a week before commencing to reemploy the strikers (R. 2884), no new men having been employed since before the strike. This reemployment was earlier than Mr. Graham, the superintendent, thought was advisable (R. 2770), but in spite of the high feelings, the Petitioner wanted to take the strikers back as fast as pos-

sible (R. 2883, 2771, 2922-3). The first men reemployed were run out by the old employees, but Petitioner put them back to work (R. 2771). All parties recognized that the situation was critical and had to be handled carefully. See Union's wires (R. 2937, 2938, 2940, 3104).

Faced with this problem, Petitioner decided on a program of gradual reemployment in order to allow feelings to cool off (R. 2883-4, 2922-3, 2769-72, 838-9, 849). It commenced to reemploy the men slowly, and this system was working well and apparently would have been successful, but the Unions stepped in to block it.

On August 15, 1937, they published and circulated a dodger called "The Sunshine Special", in which all men were notified that a strike condition still continued, and that no man should return to work (Resp. Ex. 91, R. 2890).

On August 17, 1937, they published another circular, informing the men that the mine was still under strike, and that any man going to work would be a "SCAB" (Resp. Ex. 92, R. 2892-4).

On September 3, 1937, the Unions established a picket line at Petitioner's hiring office and on the road leading to the mine to keep the men from returning to work (R. 2063-4, 2465-6, 2468, 2797-8, 2884) and distributed the following circulars to everyone who came there (Resp. Ex. 61, R. 2065, 3095).

"DON'T BE DUPED!
The Sunshine Mining Company is cleverly planning to offer the LOCKED OUT MARRIED MEN the return of their jobs.

Why? Because they know that if you go back on their terms now—they will not have to pay back wages.

Your case is in the hands of the United States government. You can depend upon definite action very soon. We came off from the job together—We will go back together, when we can be assured that the Sunshine Company will stop its unlawful tactics and discrimination.

WALLACE MINERS UNION NO. 14
KELLOGG M. & S. UNION NO. 18."

The Union representatives told the men "that they were trying to stop any of the pickets from going to work" (R. 2466).

Even when the complaint was issued (R. 14), and after the hearing when the amended complaint was filed (R. 89), the Unions and the Board claimed that the strike was still on. This was the reason the employment did not occur (R. 2883).

On July 1, 1938, in its final order, the Board ordered the Petitioner to offer immediate and full reinstatement (R. 256) to all employees who went on strike on August 2, 1937, with back pay from August 18, 1937, less wages earned (R. 257), and on request to bargain collectively with the International Union, and to embody any understandings in a "written, signed agreement for a definite term, to be agreed upon", if requested to do so (R. 257). (In 1939 the Board asked the

court to strike the words "for a definite term" from the order (R. 3226), and this was done).

4. MAJORITY REPRESENTATION AT TIME OF HEARING AND ORDER

The Board found that the maximum claims of the Unions were 315 employees, and that the smallest number in the unit was 521. It took 261 for a majority (R. 228-30). The greatest number of employees at any period was 601 (Bd. Ex. 54, R. 1043), though at the time of the hearing Petitioner was employing about 70 or 80 less (R. 2900).

There is no evidence of the Union's membership after July 31, 1937. At the date of the hearing 401 of Petitioner's employees belonged to the Big Creek (R. 3004), and 36 more had appointed it their bargaining representative (R. 3021-2).

In its pleadings the Big Creek claimed to represent a majority of all employees of Petitioner and many more than a majority of the mine and mill employees (R. 56, 72, 77) and prayed that it be recognized and adjudged the exclusive representative of all Petitioner's employees (R. 78).

The only evidence in the record as to the membership in the International and two local unions is Board's Exhibits 51 and 52 (R. 1005-8 and 1934-40), and it is from these exhibits only that the Board could make its findings. Of the persons listed on those exhibits, *sixty-one* employees signed, executed and filed in these proceedings a formal revocation of any and all right of the Unions to represent them. They also worked through the strike, went through the pick-

et lines, joined the Big Creek Union, and appointed it their bargaining agent. *Six* more revoked the Union's appointment as their representative, designated the Big Creek as such agent, and went through the picket line. *One* other revoked the Union's appointment and designated and joined the Big Creek instead.

Two more worked during the strike, went through the picket line, and appointed the Big Creek as their representative.

Thirteen more worked during the strike, went through the picket line, and joined and designated the Big Creek as their exclusive representative.

Eight more joined and designated the Big Creek as their exclusive bargaining agent.

Two more worked during the strike and testified they did not want the Union to represent them.

One more testified he did not want the Union to represent him.

Four more worked during the strike, going through the picket lines. (See Appendix 2 for names and record references).

Of the above, 94 definitely terminated all rights of the International Union and the Locals, and the last 4 probably did also. Taking these 94 from the Union's greatest claim —315, leaves only 221, a definite minority of the employees in any unit.

Of the men working before the strike, 289 or 291 joined the Big Creek (Stipulation of parties, R. 2126-7, 2225), names listed (R. 2128-37, Int. Ex. 11, 2226-35), and 12 more had designated it their exclusive agent (Int. Ex. 14, R. 3019-20), a total of 301 or 303.

The Board made no findings with reference to the Union membership at the time of the hearing, nor at the time of its order. It made no findings as to why these 94 men revoked the Union's rights and selected the Big Creek Union. It took the position at the hearing that it was wholly immaterial and irrelevant as to what happened afterwards, if the Union had a majority prior to the strike (R. 2140-2, 1992-3, 2032, 2038, 2056, 2067-8, 2070, 3019-21, 3023, 3032, 3034-6, 3040). The Board did find, however, that the strike caused the Union to alienate a number of its members (R. 232).

As to the number of Petitioner's employees who were mine and mill employees at the time of the hearing, the only evidence is the Big Creek Union's membership and designation list, and it shows that at that time practically all mine and mill employees not only were not members of the Union, and had not designated the Union as their representative, but on the contrary had joined the Big Creek and designated it as their representative. The record shows that at the time of the hearing the Big Creek Union represented a majority of all or any unit of Petitioner's employees.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below extends the operation of the Act to the labor relations of employees engaged solely in intrastate production of raw materials, even though their employer's product is never shipped in interstate commerce, but is sold to an independent producer or manufacturer who changes it in chemical and physical form, quality, and value, substantially consuming it in the process, and then, after a long and indefinite time, ships the new product in interstate commerce.

Moreover, the decision is apparently authority to sustain jurisdiction of the Board where no more is shown than that a local producer or manufacturer makes purchases of supplies and equipment originating in other states which are used in the productive operation but do not become part of the product. At the very least, the decision would uphold jurisdiction where the employer himself makes the interstate purchases.

Such far-reaching and novel results are of paramount public importance and, if the interstate power can be so drastically extended, it should be done only by decision of this Court.[1]

[1] This Court has recognized that jurisdiction "is left by the statute to be determined as individual cases arise." National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 32. Uncertainty is bound to exist where substantially different factual situations are present, and until this Court decides the question of jurisdiction administration of the Act may be impeded.

Apparently the Board is of the same opinion, because, in discussing *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, 98 F. (2d) 129, in its Fourth Annual Report, Jan. 3, 1940, p. 113 (in which the Ninth Circuit held that the Board had no jurisdiction over the operations of a gold mining corporation which obtained its necessary equipment from dealers inside the state though it was manufactured in part in other states, and which disposed of its product either to local refineries or to United States mints also located within the same state), it said:

> "While the Board did not petition for a writ of certiorari in this case, it believes that the jurisdictional issues involved are such as should ultimately be determined by the Supreme Court."

The facts in this case from which jurisdiction must be drawn are clearly distinguishable from the facts in any case yet decided by this Court involving the jurisdiction of the Board. In every case under the Act yet decided by this Court, the product shipped in interstate commerce was produced or manufactured by the person charged with unfair labor practices, and in the same form when shipped as when produced or manufactured.[2]

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[2] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1; National Labor Relations Board v. Fruehauf Trailer Co., 301 U.S. 49; National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U.S. 58; Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U.S. 453; National Labor Relations Board v. Fainblatt, 306 U.S. 601; National Labor Relations Board v. Bradford Dyeing Assn., No. 588, Oct. Term 1939, decided May 20, 1940.

In all of these cases the shipment of the product in interstate commerce followed directly and immediately upon completion of manufacture. No other element or process entered into the making of the product after it left the hands of the employer found subject to the Act, and the goods were either immediately absorbed by the ultimate consumer or went into the hands of jobbers or wholesalers for the purpose of resale. In all of these cases it was shown that the flow of the product in interstate commerce decreased on account of the labor dispute, or would certainly and immediately decrease if a labor dispute should develop.

Whatever may be the validity of the position strongly relied upon by the Board in the court below, that interstate purchases of supplies and equipment furnish an independent and self-sufficient ground of jurisdiction of employees engaged in production only, the question can hardly be regarded as settled by the decisions of this Court, since such facts do not appear in any of the decisions under the Act except *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197, 220, and there the court laid them "on one side" as "mere purchases . . . of supplies." Nor is there any intimation in the language of any of the opinions of this Court that the purchase of supplies and equipment is a determinative factor or that it should even receive consideration when production is being regulated. In all cases where the entry of goods into the state has been considered, the goods were materials which were incorporated into a product finally shipped in interstate commerce. See *National Labor Re-*

lations Board v. Bradford Dyeing Assn., No. 588, Oct. Term 1939, decided May 20, 1940. Petitioner purchases no raw materials nor materials which become part of an interstate shipment.

It seems clear that to sustain jurisdiction because Petitioner's supplies "came from sources outside the state will require the overruling of *A. L. A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, in which it should be noted Schechter Bros. Poultry Corp. not only purchased chickens in New York from commission men who had just received them from outside the State, but also itself made purchases in Philadelphia and brought them into New York. In that case, as in the instant case, the products purchased by the employer came to a permanent point of rest within the state; were not held, used or sold in relation to any further transactions in interstate commerce; were not delivered to other states; nor was there any "practical continuity" of movement.

In the *Consolidated Edison* case, though the product of the employer was not "shipped" in interstate commerce, a stoppage of work at the employer's plant would have instantaneously suspended the operation of a large number of vital instrumentalities of interstate commerce and brought about a major catastrophe. That a concern like the Edison Company should be held subject to the Act obviously furnishes no guide in this case.[3]

[3] 37 Mich. L. Rev. 938.

Chicago Board of Trade v. Olson, 262 U.S. 1; *Stafford v. Wallace,* 258 U.S. 495, and like cases, involved the introduction of goods into the state and their continuous and immediate transfer out of the state.

Despite the fact that this Court has held that the scope of interstate commerce power "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government,"[4] and has said that the word "direct" connotes the absence of an efficient intervening agency or condition,[5] the Ninth Circuit Court entirely disregards the distinction between direct and indirect effects, even going so far as to state that the *Jones & Laughlin* case extended the congressional power "even to the planting in California of orange trees whose product is to be transported in interstate commerce."[6] With such a glaring misconception of the interstate power, it is not surprising that the court below made an incomplete, inadequate, and inaccurate statement of the facts

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[4] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37.

[5] Carter v. Carter Coal Co., 298 U.S. 238, 307, 308.

[6] National Labor Relations Board v. Sterling Electric Motors, 112 F. (2d) 63, 67; Edwards v. United States, 91 F. (2d) 767, 780, where the court said the interstate power might be extended to "the planting, maintenance or abandonment of citrus groves"; see, also, language in National Labor Relations Board v. Santa Cruz Fruit Packing Co., 91 F. (2d) 790, 792, 793, and National Labor Relations Board v. Carlisle Lumber Co., 94 F. (2d) 138, 144.

which must be considered in determining the relationship of Petitioner's activities to interstate commerce[7] and that the opinion itself did not discuss the break in the chain of causation which we urge upon this Court.

The position of the Ninth Circuit Court upon the range of Federal power, as disclosed by its opinions in the *Edwards, Santa Cruz,* and *Carlisle* cases and its application of the Act to the instant case, are plainly contrary to the decisions of this Court, which uniformly adhere to the principle that "Congress may not use this protective authority as a pretext for the exertion of the power to regulate activities and relations within the state which affect interstate commerce only indirectly. Otherwise, in view of the multitude of indirect effects, Congress in its discretion could assume control of virtually all of the activities of the people to the subversion

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[7] Omits that Bunker Hill was an entirely independent concern, securing complete title to Petitioner's product, and commingling Petitioner's ore and the ore of many other mines; that approximately 80% by weight of the commingled ore is lost in making the product finally shipped; that long, varying and indefinite periods elapse between intrastate sales of Petitioner's product and shipment of purchaser's different, distinct product in interstate commerce; that the record failed to show the interstate shipments depended upon the ore purchased from Petitioner; that during the serious labor disturbances at Petioner's mines interstate shipments by the purchaser were greater than was usual; that purchaser has numerous sources of raw material other than Petitioner. The opinion mistakenly calls Petitioner "a silver producer"; implies an agency relation between the purchaser and Petitioner (p. 783); erroneously says that the record shows Petitioner buys all its supplies outside the state and ships them in. (P. 784, but see Finding of Fact I, R. 221).

of the fundamental principle of the Constitution."[8]

Further uncertainty as to the Board's jurisdiction is generated by the decision of the court below in this case, in view of the decision of the Ninth Circuit in the *Idaho-Maryland Mines* case, which decision, though possibly limited by the court below in the instant case, has been generally regarded as disapproving jurisdiction of employers whose activities are substantially similar to those of Petitioner.[9]

Future administration of the Act is seriously involved in the question whether the Board's findings of fact (R. 221, 251) with respect to the effect upon interstate commerce of stoppage of work at Petitioner's mines are sufficient under the decisions of this Court[10] requiring findings of fact to be formal, explicit and complete.

2. The final order of the Board as enforced by the Court deprived Petitioner of due process of law and so far departed from the accepted and usual course of judicial and administrative procedure as to call for the exercise of this court's power of supervision, in that it rendered judgment against Petitioner upon issues never raised and with refer-

[8] Chief Justice Hughes' concurring opinion, Carter v. Carter Coal Company, 298 U. S. 238, 317, 318.

[9] 52 Harvard L. Rev., 658; 39 Columbia L. Rev., 834; 37 Mich. L. Rev., 938.

[10] National Labor Relations Act, Sec. 10(c); Wichita Railroad & L. Co. v. Public Utilities Com., 260 U.S. 48, 59; Florida v. United States, 282 U.S. 194, 215; Atchison T. & S. F. R. Co. v. United States, 295 U.S. 193, 202; West Ohio Gas Co. v. Public Utilities Com., 294 U.S. 63.

ence to which Petitioner had no notice nor an opportunity to be heard.

The facts can be reduced to this statement. The Board entered a final order, served on July 1, 1938, which found that Petitioner committed an unfair labor practice in June and July, 1937, in refusing to recognize the International Union as the exclusive representative of Petitioner's "mine and mill employees, excluding supervisory, clerical and technical employees" (R. 227). It further found that that unit was the appropriate unit (R. 228), and that at the time of the requests to bargain, the International Union represented the majority of that unit (R. 233).

The record shows the following facts without contradiction:

1. It was admitted in the pleadings by all parties that the proper unit was "all the employees, less supervisory officials and executives", and the only issue was whether or not the technical and office employees should also be excluded.

2. No union at any time claimed to represent the unit found by the Board, that is, the "mine and mill employees".

3. No union ever requested or demanded bargaining rights for that unit.

4. No charge nor complaint was ever filed, no issue was presented and no evidence was introduced, with reference to that unit. No one ever heard of it until the Board's order on July 1, 1938.

5. Likewise no charge nor complaint was ever filed, no issue was presented and no evidence was introduced, with reference to the International Union as the representative for bargaining purposes of any unit.

6. No notice of the new claims by the Board was ever given and no hearing was held thereon.

The Board's order as to the unit, the demand and refusal to negotiate, the representative, the majority, and the contract, is wholly without support in the record. There is neither evidence, claim, charge, allegation nor complaint upon which those findings can rest.

> "To put into the case now an issue heretofore kept out of it . . . would be a denial of a full and fair hearing by the tribunals of the state, a denial forbidden by the Constitution of the nation." (*West Ohio Gas. Co., v. Public Utilities Comm.*, 294 U.S. 63, 77).

The Board and the Ninth Circuit have entirely failed to recognize the procedural requirements of due process. The effect of their decision is that an employer is not entitled to be advised and given an opportunity to meet the charges against it; that is is perfectly proper to charge one unlawful act, file a complaint for another, prove at the hearing that both the charge and the complaint are wrong, and then find the employer guilty of something else entirely different from the charge and from the complaint, and not even raised by the evidence. In his concurring opinion in this case Judge Haney said:

"Third. The Board found that respondent refused to bargain with the representatives of a smaller unit than the one claimed by such representatives. For the reasons expressed in my dissenting opinion in National Labor Relations Bd. v. National Motor B. Co., 9 Cir., 105 F. (2d) 652, 666, I think the Board had no power to find that respondent committed an unfair labor practice by refusing to bargain with representatives of a unit of lesser number than the one claimed by the union. However, I recognize that the cited case is binding on me, and therefore concur with the holding in this case." (R. 3227).

Petitioner has been found guilty of refusing to do an act it was never requested to do, though this court in *National Labor Relations Board v. Columbian Co.*, 306 U.S. 292, 298, held:

"The employer cannot, under the statute, be charged with a refusal of that which is not proffered."

No opportunity was given Petitioner to show that the Union did not in fact represent a majority of the mine and mill employees. That issue was not even brought up, because no one had ever contended that the mine and mill employees were the proper unit; no one had ever claimed that they represented the mine and mill employees; no one had ever sought or asked to bargain for the mine and mill employees. Until the Board's final order no one had even heard of the mine and mill employees as an appropriate unit.

As said in *Burton v. Platter*, 53 F. 901, 905 (C.C.A. 8th):

"Nothing can better illustrate the injustice and irregularity of this proceedings than the statement of these facts. No notice of the ground on which the judgment was to be rendered, no opportunity to contest their execution

of the bond or their liability upon it, was given to any of these interveners until after the hearing was concluded, and the master's report filed."

In administrative proceedings the inexorable requirement is a fair hearing and fair play (*Federal Communications Com. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143), and an employer gets neither unless he is given notice and an opportunity to contest the claim to be made against him.

> "It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its actions." (*Wichita R. R. v. Public Utilities Comm.*, 260 U.S. 48, 59).

In enacting Section 10 of the Act providing for a charge, and a complaint based on the charge, and then a hearing upon the complaint Congress "had regard to judicial standards, —not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." (*Morgan v. United States*, 304 U.S. 1, 19).

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." (*Morgan* case, *supra*, p. 18).

Petitioner was never given this opportunity. It was told what the Board's claim was; issue was formed on that claim, and that issue was litigated; then the Board, having wholly failed to establish its claim, instead of so holding and dismissing the proceeding, or referring it back for the formation of new issues and a hearing thereon, simply manufactured

new issues out of whole cloth; and without claim, charge, complaint, or evidence, and without giving Petitioner notice or opportunity to be heard, decided those issues and entered its final order.

> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." (*Morgan* case, *supra*, p. 18-19).

Careful observance of fair play by the Board is even more important than by other administrative boards, because no contest of its jurisdiction can be had until after a long and expensive litigation, its findings of fact are given the status of a jury's verdict, and the penalty it assesses against an employer may, as here, amount to hundreds of thousands of dollars. The following statement of this court in *Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U.S. 292, 304-5, applies with special emphasis to the Board's proceedings:

> "All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." (Court's citations omitted.)

3. There is no evidence, substantial or otherwise, that

Petitioner refused to recognize, negotiate or bargain with any union as the representative of a majority of its mine and mill employees. Nor is there any evidence whatsoever that the Union ever represented a majority of Petitioner's mine and mill employees.

This raises a vital question in the administration of the Labor Relations Act. Under the Act, whenever an employer is presented with a demand to recognize a union as the representative of a majority of his employees within a designated unit, he has two alternative duties: One, a positive duty to bargain with that union if, in fact, it represents a majority of the employees in the designated unit; and, two, a negative duty not to negotiate or bargain with such union if it does not represent a majority of the employees in the designated unit. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44. When the union demanded the right to represent and bargain for *all* of Petitioner's employees, Petitioner, doubting its majority status and right of representation, refused to so bargain. That refusal was a refusal to execute a closed shop contract with the International Union covering and binding all of Petitioner's employees and recognizing the Union as the representative thereof (Bd. Ex. 19, R. 448-52). It was followed by a strike caused solely and only by that refusal (R. 237, 244, 232). Thereafter the Union filed a charge alleging a refusal to recognize a joint committee of two locals as the exclusive representative of all the employees; then the complaint was filed upon the theory that two local unions jointly represented all of the employees,

excluding supervisory officials, executives, technical and office employees. The hearing was had upon the questions whether or not the designated unit was proper, and whether or not the two local unions jointly represented a majority of all such employees.

All parties were agreed as to the method of determining the majority question. Since all of Petitioner's employees were eligible for union membership, it was necessary only to ascertain the names of all the employees, determine those whom the Board claimed were supervisory officials, executives, technical or office help, and deduct them from the number of all of the employees. The remainder would be the number in the unit. It would then be a simple matter to check the Union membership claims with the total lists of employees, and obviously it would make no difference whether the employees were mine and mill employees or sawmill employees, or surface employees, warehouse employees, truckers, truck helpers, or shovel runners, etc. (R. 125-29, 602, 1004-8, 1033-40, 1043-61, 1063-81, 1081-1100).

This procedure was agreed upon, and apparently followed out (R. 602-3), until the matter reached the Board. It disregarded the earlier proceedings. First it blandly misstated the requirement of Union membership, finding it to be limited to mine and mill employees (though all employees except officials and executives were eligible to membership. (R. 1179-80). Having by this alchemy changed the union members from "all employees" into "mine and mill employ-

ees", the Board then proceeded to find that the Union had a majority of mine and mill employees. It made this finding despite the utter lack of evidence of:

1. Either the number or names of those of Petitioner's employees who were mine and mill employees; and

2. Either the number or names of those of Petitioner's employees claimed by the Union, who were mine and mill employees.

4. By ordering Petitioner to reinstate all strikers with back pay from August 18, 1937, the Board abused the discretion vested in it to order affirmative action to effectuate the policies of the Act. Its order was arbitrary and capricious in the extreme. In so ordering the Board committed, and the Circuit Court sanctioned, such an abuse of power as to call for the exercise of this Court's power of supervision; and decided an important question of federal law contrary to the decisions of this Court. To the extent that the question has not been decided by this Court it should be.

The Board found that the sole and only cause of the strike was Petitioner's refusal to bargain and contract with the Union "as the exclusive representative of its employees in an appropriate bargaining unit" (R. 237).

The Circuit Courts have held that as long as an employer's refusal is based upon a bona fide doubt as to the majority or the unit that he does not act at his peril. *National Labor Relations Board v. Highland Park Mfg. Co.*, 110 F. (2d)

632, 640 (C.C.A. 4th); *National Labor Relations Board v. Piqua Munising Wood Products Co.*, 109 F. (2d) 552, 556, 558 (C.C.A. 6th); *Black Diamond S. S. Corp. v. National Labor Relations Board*, 94 F. (2d) 875, 879 C.C.A. 2nd). This can only mean, and does mean, that under such circumstances he can refuse to bargain, and if he does so refuse he will not be penalized by a back pay award.

After the filing of the petition by the Union on July 15, 1937, asking to be certified as the exclusive representative of all of Petitioner's employees (R. 446, 2902), and especially after the Board took jurisdiction thereof (R. 2902-3), it would have been definitely improper, if not illegal, for Petitioner to have taken the matter into its own hands and recognized some alleged agency as the exclusive representative of an entirely different unit.

During the period necessary for the Board to make its investigation and to hold its statutory proceedings and issue its order, all parties should be required to maintain the status quo.

Certainly in such circumstances the policies of the Act will not be effectuated by requiring an employer to act, or refrain from acting at his peril.

Petitioner was wholly within its rights in refusing the Union's offer to turn over its books to the Board if Petitioner would agree to be bound thereby (which books would have proven nothing. *National Labor Relations Board v. Empire Furniture Co.*, 107 F. (2d) 92, 94 (C.C.A. 6th) and in prefer-

ring regular proceedings by the Board under Section 9 instead of a consent election. *National Labor Relations Board v. Stackpole Carbon Co.*, 105 F. (2d) 167, 175 (C.C.A. 3rd). The Union had petitioned for certification as the exclusive representative of all the employees, and the Board and Petitioner agreed to a regular proceedings under Section 9 of the Act.

The refusal by Petitioner to recognize the Union as the exclusive representative of *all* the employees and to enter into a closed shop contract was correct and lawful (*Jones & Laughlin* case, 301 U.S. 1, 44, Sec. 8(3) of Act) because it was not such a representative. The strike was therefore wrongful and a tort by the Union and the strikers, and the Board was without power to order their reinstatement. *Ballston-Stillwater K. Co. v. National Labor Relations Board*, 98 F. (2d) 758, 764 (C.C.A. 2nd); *Republic Steel Corp. v. National Labor Relations Board*, 107 F. (2d) 472, 478 (C.C.A. 3rd). That this is correct seems to be the result of *National Labor Relations Board v. Mackay Radio & T. Co.*, 304 U.S. 333; *National Labor Relations Board v. Columbian E. & S. Co.*, 306 U.S. 292; *National Labor Relations Board v. Sands Mfg. Co.*, 306 U.S. 332; and *National Labor Relations Board v. Fansteel Metal Corp.*, 306 U.S. 240. The distinction between the first case and the later ones lies in the fact that in the later cases the strike involved was a wrongful act by the Union.

During June, July and August, 1937 (and in fact ever since) all parties have recognized that it was questionable

if the Act applied to Petitioner. Likewise all were in doubt as to what was the proper unit, as to whether a majority in the proper unit had selected a bargaining agent, and if so, who.

After the strike Petitioner attempted to employ the strikers. Immediately the Union intervened and by publications and picket lines prevented the men from going back to work. With full knowledge of these facts, however, and undoubtedly as a punishment, the Board on July 1, 1938, ordered reinstatement of all strikers with back pay from August 18, 1937. This may amount to 10½ months salary for 216 men (if trial examiner's report is correct (R. 140)), or 58,968 working days at an average of over $6.00 a day—a fine of about $350,000.00.

This Court has held that the Board cannot punish an employer (*Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 235-6), and that in entering decrees enforcing the Board's order, equitable doctrines control (*Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364, 373; *United States v. Morgan*, 307 U.S. 183, 191).

Petitioner submits that it is inequitable and unjust to assess this large accumulating penalty against it, and that even if the reinstatement order should not be set aside in toto, the commencement of the back pay should be at least postponed until July 1, 1938, the date of service of the Board's order. The inequity of the order is further shown by the statement of the Second Circuit in *National Labor Relations*

Board v. National Casket Co., 107 F. (2d) 992 ,995, that "when a complaint involves the granting of affirmative relief against an employer it is particularly desirable that the case be prosecuted to conclusion with as much expedition as is reasonably practicable, for any unnecessary delay results in obvious hardship to the employer, since the longer the delay, the larger the sum he must pay as wages for work never performed, if the order requires reinstatement with back pay."

It must be remembered that this question would not have occurred if the Board had proceeded to hold a regular certification proceedings, and the Union had not wrongfully struck. At the hearing upon the certification petition all questions of the applicability of the Act, the proper unit and the majority status could and would have been settled by the orderly processes of the law, and no one would have left his job.

5. In enforcing the order of the Board and assessing Petitioner with an enormous accumulating fine and penalty in the form of an award of back wages since August 18, 1937, the decree of the Circuit Court deprived Petitioner of its property without due process of law and decided an important federal question contrary to the applicable decisions of this court.

The rapid expansion of their regulatory powers by federal and state governments raises the question as to whether or not an individual, who acts in the best of faith and upon

the most reasonable of grounds, has a right to have the applicability of a particular law to his activities judicially determined, without facing confiscatory penalties if the Court should ultimately decide that he was mistaken.

Under the Labor Relations Act no judicial determination of the applicability of the Act to Petitioner could be obtained until after the final order was entered. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-9; *Newport News S. & D. Co. v. Schauffler*, 303 U.S. 54; Sec. 10(a) of Act. An order awarding back pay is a sanction, a fine, a penalty to enforce compliance with the Act (*National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48; *St. Louis Iron M. S. Ry. v. Williams*, 251 U.S. 63, 66; *Sunshine Anthracite Co. v. Adkins*, No. 804, Oct. Term 1939, decided May 20, 1040), and does not create private rights (*Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 262).

This Court and the lower federal courts have established the rule that to assess fines, penalties, and liabilities against an individual for acts and conduct prior to a judicial determination that his activities were subject to a regulatory act would deprive him of his property without due process of law, if he cannot obtain a determination of the applicability of the Act until after he is subject to penalties for violating it, and if his doubts as to the applicability, and desire for a judicial determination thereof, are in good faith and based upon reasonable grounds. *St. Louis I. M. S. Ry. v. Williams*, 251 U.S. 63, 64-5; *Wadley So. Ry. v. Georgia*, 235 U.S. 651,

661, 662-3; *Southwestern T. & T. Co. v. Danaher,* 238 U.S. 482, 491; *Oklahoma Operating Co. v. Love,* 252 U.S. 331, 338. See, also, recognition of doctrine in *Sunshine Anthracite Co. v. Adkins,* No. 804, Oct. Term, 1939, decided May 20, 1940; and dissenting opinion of Justice Cardozo in *Carter v. Carter Coal Co.,* 298 U.S. 238, 340-1. In the lower courts, also, the doctrine is recognized and enforced. *Uebersee Finanz-Korporation v. Rosen,* 83 F. (2d) 225, 228 (C.C.A. 2nd); *Marysville v. Standard Oil Co.,* 27 F. (2d) 478, 486 (C.C.A. 8th).

That Petitioner acted in good faith and upon reasonable grounds cannot be questioned. That it was mistaken has been found by the Board and the Circuit Court; but its good faith in doubting the applicability of the Labor Relations Act to it, and the reasonableness of its grounds therefor have not been questioned by the Board's order. It continuously maintained its position. In July, 1937, it wrote the Board calling attention to its claim that the Act did not apply to its operations (Resp. Exs. 101-3, R. 2911-5), and the Board's representative and attorney recognized that there was a serious question of jurisdiction (R. 2902-3). After the complaint was filed Petitioner raised the question by motion to dismiss (R. 51), and also in its answer (R. 26), and referred to it in its exceptions to trial examiner's report (R. 142, 193-4). These were noted by the Board (R. 215) and by the Circuit Court (R. 3196-7, 3207).

Certainly no injury can be done to the policy of the Act by enforcing the beneficent policy of the rule here invoked and denying enforcement of the back pay order. As the

Second Circuit said in the *Uebersee* case, supra, 83 F. (2d) at 228:

> "it is quite incredible that a penalty would or could be enforced against persons who had acted in good faith and done no more than to have their rights adjudicated in a lawsuit."

6. In directing Petitioner to bargain with the Union, though the Union did not represent a majority of either the employees or the mine and mill employees at the time of the hearing, the Board and the Circuit Court ordered Petitioner to violate Sections 9(a), 8(3) and 8(5) of the Act and the policy of the Act as declared in Section 1. In so doing the court decided an important question of federal law contrary to the decision of this court in *National Labor Relations Board v. Fansteel Metal Corp.*, 306 U.S. 240, 262, and also in conflict with that of the Eighth Circuit in *Hamilton-Brown Shoe Co. v. National Labor Relations Board*, 104 F. (2d) 49, 54-6.

Petitioner was ordered to bargain with the International Union as the exclusive representative of its "mine and mill" employees, excluding supervisory, technical and clerical employees, and if an agreement was reached, to enter into a written contract.

The record is not only barren of evidence that the International Union represented a majority of such employees in June, July and August, 1937, but it affirmatively shows without contradiction that at the time of the hearing the Union did not represent a majority of the mine and mill employees,

nor of all the employees, and that a majority of all employees in all classifications of employment had joined and designated the Big Creek Union as their representative for collective bargaining.

This point was raised, but not contested by the Board. Its position at all times was that if the local unions had a majority at any one time, it was wholly immaterial what may have happened thereafter (R. 1992-3, 2032, 2038, 2056, 2067-8, 2070, 2140-2, 3019-21, 3023, 3032, 3034-6, 3040).

Assuming that there is evidence in the record from which the Board could find that some Union or Unions in June, July, and August represented a majority of some unit of Petitioner's employees, the record further shows that at least ninety-four of the employees claimed by the Union revoked any and all right of the Union to represent them. The Board made no finding as to why these men revoked the Union's rights, but admitted that that occurred (R. 3036, 3034, 3019-20). There is also no finding by the Board as to why the men joined and designated the Big Creek Union as their representative, although it is stipulated that they did so, and freely and voluntarily (R. 2126-27). The employees unquestionably had a right to revoke the International Union's agency status, and to join another union.

Under these uncontradicted facts it was error to order Petitioner to bargain with a minority group and thus violate the law. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44. In *National Labor Relations*

Board v. Fansteel Metal Corp., 306 U.S. 240, 262, in which the record showed a change of circumstances, this court said:

> "we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent's employees for the purpose of collective bargaining."

The court further held that while it was proper to order the employer to cease and desist from interfering, by dominating a company union, with the employees' right to self-organization that "it is a different matter to require respondent to treat Lodge 66 in the altered circumstances as such a representative." (p. 262).

In the *Hamilton-Brown* case, *supra,* (104 F. (2d), 49, 56) the court held that to order an employer to continue to bargain with a Union which had or may have lost its majority status was to order a direct violation of the Act, and further held that to enforce an order to bargain under circumstances similar to the case at bar would be "arbitrary and unfair" and "unwise, if not illegal."

The problem here involved is of major importance in the administration of the Act. It must be determined if the Act is to guarantee the right of free choice to the employees as to whether or not he wants a representative for collective bargaining; if so, who he wants as such representative; and whether he may change the representative at his pleasure.

7. In ordering Petitioner to bargain with the Union, without conditioning such order upon the holding of an elec-

tion to determine whether or not the Union is now the representative of a majority in the established unit, the Circuit Court abused its discretion. Its order is in conflict with decisions of other circuits on the same matter, and raises an important question in the administration of the Labor Relations Act. As the question has not been directly decided by this Court, it should now be determined.

The record in this case tends to show the membership and designation of the Union only as of June 28th, July 9th, and July 31st, 1937. The Union's attempt to organize Petitioner's employees commenced only a short time prior to June 28th (R. 425). The strike occurred August 2, 1937, and the chronology of succeeding events is as follows: The hearing took place between September 5th and October 15th, 1937; the trial examiner's report was served shortly after January 15, 1938; the Board's order was served on July 1st, 1938; jurisdiction of the Circuit Court was invoked on May 15, 1939; the opinion of the Circuit Court was filed on April 3, 1940; and the petition for rehearing was denied June 19, 1940.

Practically three years has passed since any evidence in the record of majority representation. The Circuit Court of the Eighth Circuit in *Hamilton-Brown Shoe Company v. National Labor Relations Board*, 104 F. (2d) 49, 55-6; the Circuit Court of the Second Circuit in *National Labor Relations Board v. Remington Rand*, 94 F. (2d) 862, 869; *National Labor Relations Board v. National Licorice Company*, 104 F.

(2d) 655, 658; affirmed in principle, 309 U.S. 350, 356, 359; *National Labor Relations Board v. American Mfg. Co.*, 106 F. (2d) 61, 68; affirmed in principle, decision per curiam, No. 664, Oct. Term, 1939, decided March 11, 1940; the Circuit Court of the Fourth Circuit in *Standard Lime & Stone Co. v. National Labor Relations Board*, 97 F. (2d) 531, 535; and the Circuit Court of the Seventh Circuit in *Stewart Die Casting Corporation v. National Labor Relations Board*, 113 F. (2d) ——— decided July 3, 1940, have held that the passage of a much shorter period makes it improper to order an employer to bargain exclusively with a union which may previously have been the majority representative until after an election has been held to determine the current choice of the majority of the employees.

The record conclusively shows that a majority of those who were employees of Petitioner at the time of the strike, and a majority of the employees at the date of the hearings either including or excluding the strikers, were at the time of the hearing in fact not then represented by the International Union, but were represented by the Big Creek Union. Ninety-four of those claimed by the Union had revoked its designation in writing. In other words, at the time of the hearing the Union did not represent a majority either of all the employees, or of the mine and mill employees, and at the time of the strike and prior thereto, it did not represent a majority of the mine and mill employees. Neither the Board nor the Circuit Court paid any attention to this fact, and the Board took the position at all times that it was utter-

ly immaterial whether the Union continued to represent a majority after the original request to bargain. The rule of the above cases should be here invoked for the additional reason that in this case no one could ever be certain as to what the proper unit was and what employees were within the appropriate unit.

9. In ordering Petitioner to enter into a written contract with the Union if future negotiations resulted in an agreement, the Circuit Court decided an important federal question which should be passed on by this court. The holding of the lower court is contrary to the decision of *National Labor Relation Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45; and the decisions of the Seventh Circuit. It is in conformity with the decisions of other circuits.

Because this Court, on June 3, 1940, granted certiorari upon this question in *Heinz Co. v. National Labor Relations Board*, Docket 73, 1940-41, Petitioner submits this reason upon the showing made in that case and the Court's granting of that petition.

Respectfully submitted,

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APPENDIX—1

NATIONAL LABOR RELATIONS ACT

Sec. 1.

. . . . . .

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Sec. 2. When used in this Act—

. . . . . .

(3) The term "employee" shall include any employee . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . .

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Terri-

tory, or between any foreign country and any States, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in Section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

. . . . . .

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guarantee in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules

and regulations made and published by the Board pursuant to Section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *Provided:* That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft, unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

Section 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the

issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

. . . . . .

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeal to which application may be made are in vacation, any district court of the United States (in-

cluding the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and therefrom shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the

court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this Section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

Section 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

Section 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

RULES AND REGULATIONS
of
NATIONAL LABOR RELATIONS BOARD

Series 2, As Amended
Effective March 13, 1940

ARTICLE II.

Section 5. After a charge has been filed, if it appears to the Regional Director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the "parties") a formal complaint in the name of the Board stating the charges and containing a notice of hearing before a

Trial Examiner at a place therein fixed and at a time not less than ten days after the service of the complaint. A copy of the charge upon which the complaint is based shall be attached to the complaint. . . .

Sec. 7. Any such complaint may be amended upon such terms as may be deemed just; prior to the hearing, by the Regional Director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to Section 32 of this Article, upon motion, by the Trial Examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to Section 32 of this Article at any time prior to the issuance of an order based thereon, by the Board.

. . . . . .

Sec. 10. The respondent shall have the right, within ten days from the service of the complaint, to file an answer thereto. Such answer shall contain a short and simple statement of the facts which constitute the grounds of defense. The respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Any allegation in the complaint not specifically denied in the answer, unless the respondent shall state in the answer that the respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Board.

. . . . . .

Sec. 13. The respondent may amend his answer at any time prior to the hearing. During the hearing or subsequent thereto, he may amend his answer in any case where the complaint has been amended, within such period as may be fixed by the Trial Examiner or the Board. Whether or not the complaint has been amended, the answer may, in the discretion of the Trial Examiner or the Board, upon

motion, be amended upon such terms and within such periods as may be fixed by the Trial Examiner or the Board.

. . . . . .

Sec. 24. It shall be the duty of the Trial Examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. Counsel for the Board, and the Trial Examiner, shall have power to call, examine, and cross examine witnesses and to introduce into the record documentary or other evidence.

. . . . . .

ARTICLE III.

PROCEDURE UNDER SECTION 9(c) OF THE ACT FOR THE INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES

Sec. 2. (*a*) Such petition, when filed by an employee or any person or labor organization acting on behalf of employees, shall contain the following:

(1) The name and address of the petitioner.

(2) The name and address of the employer or employers involved, the general nature of their businesses, and the approximate number of their employees.

(3) A description of the bargaining unit which petitioner claims is appropriate and the approximate number of employees in such unit.

(4) The number or percentage of employees in such unit who have designated or selected petitioner to be their representative for collectivebargaining.

(5) The names of any other known individuals or labor organizations which claim to represent any of the employees in the alleged bargaining unit.

APPENDIX—2

NAMES	Written Revocation of Union	Written Designation of Big Creek (Record pp.)	Joined and Designated Big Creek by Stipulation of Parties (R. 2126-7)	Testified on Hearing Did Not Want Union	Worked During Strike
Adams	3037	3037	2128	2153	2106
Anderson, A.				2328	2106
Baker	3038	3038	2128	2211	2107
Barnes	2184	2184	2128	2181	2107
Bathwell	3038	3038	2128	2205	2107
Baumann	3038	3038	2128	2249	2107
Bean	3039	3039	2128	2777	2107
Bedard	3038	3038	2128	2323	2107
Berg	3038	3038	2129	2287	2107
Bisson	3039	3019-22		2266	2107
Botzon	2031	2031	2129	2026	2108
Box	3038	3038			2107
Boyd	3038	3038	2128	2220	2107
Bradshaw	3038	3038	2128	2258	2107
Caballero			2129 2227		
Carlson	3038	3038	2130	2276	2108
Chaney			3025 3031		
Clark, Oscar	3038	3038	2129		2108
Clarke, C. C.	3038	3038	2129	2188 2194	2108
Cochrane	1997	1997	2129	1990	2108
Connelly					2108
Conner			2129 2227		2108
Cook, H.		3019-22		2251	2108
Cook, R.					2108
Crawford			2129 2227	2274	2109
Cunningham	3038	3038	2130	2269	2109

NAMES	Written Revocation of Union	Written Designation of Big Creek (Record pp.)	Joined and Designated Big Creek by Stipulation of Parties (R. 2126-7)	Testified on Hearing Did Not Want Union	Worked During Strike
D'Andrea	3038	3038	2130	2170	2109
Davis	3038	3038	2130	2424	2109
Day, T. A.	3038	3038	2130	2196-7	2109
Day, W.			2130	2619	2109
Demers	3038	3038	2130	2179	2109
Destifano	3038	3038	2130		2109
Dickens	3038	3038	2130		2109
Enama	3038	3038	2131	2241	2109
Evans			2131 2229		2109
Fagan, M.	3038	3038	2131	2279	2109
Fagan, T.	3038	3038	2131		2109
Faraca	3038	3038	2131	2200	2109
Forney			2131	2334	2110
Franklin			2131 2229	2476	
Fuller	3038	3038	2131	2391	2110
Gillespie	3038	3038	2131	2553	2110
Goggin	3038	3038	2131		2110
Haxton	3038	3038		2472	2110
Hayes					2111
Held			2131	2420	2111
Hougland	3038	3038	2132	2785	2111
Howell, J.	3038	3038	2132	2294-5	2111
Howell, R.			2132	2436	2111
Jessen, L.	3038	3038	2132	2368	2111
Kirk			2132 2230		
Knowlan	3038	3038	2133		2112
Kranches					2112
Kulm	3038	3038	2133	1886	2112

NAMES	Written Revocation of Union	Written Designation of Big Creek (Record pp.)	Joined and Designated Big Creek by Stipulation of Parties (R. 2126-7)	Testified on Hearing Did Not Want Union	Worked During Strike
Lamm	3038	3038	2133	2305	2112
Larson, A. N.	3038	3038	2133	2256	2112
Lasher	3038	3038	2133		
Livermore	3038	3038		2527	2112
Loftis, A.	3038	3038	2133		2112
Lundy	3038	3038	2133	2696	2112
MacCrimmon	3038	3038	2134	2366	2113
McKenzie	3038	3038	2134	2427	2113
McKimmey	3038	3038	2134	2158	2113
Maddox	3038	3038	2133	2353	2112
Mara	3038	3038	2134	2238	2112
May	3038	3038	2133	2483	2113
Milionis	3038	3038		2352	2113
Nickelby			2134 2232		
Patrick	3038	3038	2135	2509	2114
Peck			2134	2662	2114
Pedersen, A.	3039	3039	2134	2546	2114
Pedersen, P.	3039	3039	2134		2114
Poelke	3039	3039	2134	2702	2114
Portwood	3039	3039	2135		2114
Price	3038	3038	2135	2579	2114
Richings			2135		2114
Rizzonelli, E.			2134 2233		
Rudy	3039	3039	2135	2675	2114
Sagdal	2172	2172	2135	2042	2115
Sanders			2135 2233		
Scheffel	3039	3039	2136		2115
Seaman	3039	3039	2135		2115
Solonen	3039	3039		2654	2115

NAMES	Written Revocation of Union	Written Designation of Big Creek (Record pp.)	Joined and Designated Big Creek by Stipulation of Parties (R. 2126-7)	Testified on Hearing Did Not Want Union	Worked During Strike
Stayner			2135 2233		
Stensaas	3039	3039	2136	2515	2115
Stokes	3039	3039	2136	2479	2116
Stone	3039	3039	2136		2116
Terrill, M. H.	3039	3039		2679	2116
Tylen				2625	2116
Vanhouten			2137	2711 2717-8	2116
Vickerman				2649	
White	3039	3039	2137	2597	2116
Widmer	3039	3039	2137	2592	2116
Wold	3039	3039	2137	2794	2116
Wruble	3039	3039	2137		2117
Wyatt	3039	3039	2137	2151	2117
Zarse			2137 2235		

No. 352

In the Supreme Court of the United States

OCTOBER TERM, 1940

SUNSHINE MINING COMPANY,
a corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF SUPPORTING PETITION FOR CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No.....

SUNSHINE MINING COMPANY,
a corporation,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF SUPPORTING PETITION FOR CERTIORARI

OPINIONS BELOW

The original findings of fact, conclusions of law, and order of the Board (R. 217-258) are reported in 7 N. L. R. B. 1252. The opinion of the Circuit Court of Appeals (R. 3191) is reported in 110 F. (2d) 780.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on April 3, 1940 (R. 3228). A petition for rehearing filed by Petitioner was granted June 7, 1940 (R. 3233). The decree was confirmed without specification of reason June 19, 1940 (R. 3235). The jurisdiction of this Court is invoked under Title 28 U. S. C. Sec. 347, and Sections 10(e)

and (f) of the National Labor Relations Act, Title 29 U. S. C. Sec. 160.

STATEMENT

Petitioner adopts the statement of the case made in its petition herewith (pp. 5 to 22) as the statement in this brief.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred:

1. In holding that the Board had jurisdiction.

2. In not holding that Petitioner had been deprived of procedural due process of law.

3. In not holding that the awarding of back pay to all strikers commencing with August 18, 1937, deprived Petitioner of its property without due process of law.

4. In not holding that the Board had abused its discretion (to order affirmative action to effectuate the policies of the Act) in ordering Petitioner to reinstate all strikers with back pay since August 18, 1937.

5. In holding that there was substantial evidence that the Union represented a majority of Petitioner's mine and mill employees in June, July and August, 1937, that such employees constituted an appropriate unit and that Petitioner refused to bargain with the Union as the representative of that unit.

6. In holding that the Board's order requiring Peti-

tioner to bargain with the Union as the representative of its mine and mill employees should be enforced, though at the date of the hearing the Union did not represent a majority of the unit defined.

SCOPE OF BRIEF

Petitioner submits all questions and specifications of error upon its petition for writ of certiorari, except the questions of jurisdiction, denial of due process of law, and lack of substantial evidence to support findings of unit, majority and refusal to bargain. Petitioner believes that the other questions are sufficiently covered in the petition, but that the questions of jurisdiction and the Board's procedure and findings merit, if they do not demand, amplification.

ORDER OF BRIEF

Part One will consider the question of interstate commerce and the Board's findings with reference to jurisdiction.

Part Two will consider the Board's procedure and its findings with reference to the appropriate unit, the majority status of the Union as the exclusive representative of that unit, and the question of whether or not there has been a refusal to bargain under the statute.

ARGUMENT

I. THE ACT IS NOT APPLICABLE TO PETITIONER'S OPERATIONS

To support the drastic extension of its authority to this case, the Board must assume the burden of demonstrating clearly and definitely,[1] and through express and complete findings of fact[2] that a diminution, interruption or stoppage of Petitioner's activities would necessarily result in an immediate, direct and substantial diminution, injury or stoppage of interstate commerce; and that there is an unbroken chain of causation between its activities and in-

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[1] Since the attempt is to exert the Federal power within what would otherwise be the domain of state power, the justification for the exercise of Federal power must clearly appear. Florida v. United States, 282 U. S. 194, 211, 212; Illinois C. R. Co. v. Public Utilities Com., 245 U. S. 493, 510; Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 223.

[2] National Labor Relations Act, Sec. 10(c); " . . . the validity of the order must rest upon the needed finding." Wichita Railroad & L. Co. v. Public Utilities Com., 260 U. S. 48, 59. And the findings must be formal, explicit, express and definite. Saginaw Broadcasting Co. v. Federal C. Com., 96 F. (2d) 554, 559; certiorari denied 305 U. S. 613. Baltimore & O. R. Co. v. United States, 22 Fed. Supp. 533, 537. 38 Columbia L. Rev., 978, 988. Lack of express findings by an administrative agency may not be supplied by implication. Atchison T. & S. F. R. Co. v. United States, 295 U. S. 193, 202. "The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission, but to ascertain whether its findings are properly supported." Florida v. United States, 282 U. S. 194, 215. An order based upon inadequate findings is a denial of due process. West Ohio Gas Co. v. Public Utilities Com., 294 U. S. 63, 69, 70. See, also, Heitmeyer v. Federal C. Com., 95 F. (2d) 91.

terstate shipments without an active, efficient, intervening agency.[3]

To establish its jurisdiction the Board apparently places primary and independent reliance upon the claim that Petitioner purchases supplies and equipment for its operations through the channels of interstate commerce. This claim is not supported by the Board's findings of fact. The Board's only finding upon this subject was, "In 1936, the respondent purchased supplies, equipment, electrical current, machinery and other materials used in its operations amounting to approximately $700,000. Approximately 60 per cent of these purchases came from sources outside the State of Idaho." (R. 221). This is not a finding that Petitioner purchased supplies and equipment through the channels of interstate commerce, but merely that the supplies and equipment purchased originated outside the state. Nor is the rule of this Court with respect to findings of fact satisfied by "implying" or "inferring" from the Board's finding a purchase by the Petitioner through the channels of interstate commerce. See *Atchison T. & S. F. R. Co. v. United States, supra.* Nor by reference to the record. *Florida v. United States, supra.*

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[3] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 543; National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 37; Carter v. Carter Coal Co., 298 U. S. 238, 307, 308; Santa Cruz Fruit Packing Co. v. National Labor Relations Bd., 303 U. S. 453, 466, 467; National Labor Relations Board v. Fainblatt, 306 U. S. 601, 604; Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 223.

Certainly it is not necessary to argue that jurisdiction cannot rest on the mere fact that supplies and equipment "originated" in other states. Into a Federal maw, if it were otherwise, would come every activity where men are employed.

Even if the Board had made findings which supported this claim its jurisdictional position would have been no better, because the claim itself has no support in the decisions nor in relevant principle. In fact, in view of *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, it is surprising that the contention is made at all. In that case, where all the purchases came from, and some were directly made outside the state, this Court said (p. 543):

> "The poultry had come to a permanent rest within the State. It was not held, used or sold by the defendants in relations to any further transactions in interstate commerce and was not destined to other States. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here."

The supplies and equipment in this case did not subsequently move in interstate commerce, nor are they destined to other states in any form. They are, in fact, either used up or worn out in mining ore within the state. They came to a permanent point of rest within the state. They are not part of a "practical continuity of movement." The *Schechter* case sets a definite limit of jurisdiction, as

does the *Jones & Laughlin* case where the materials imported were made into the product exported by the employer; when the materials came into the state, they were destined to other states, being at all times in control of the employer who was to introduce them into interstate commerce. And in *National Labor Relations Bd. v. Bradford Dyeing Assn.*, No .588, Oct. Term 1939, decided May 20, 1940, the goods imported became part of the product which was actually shipped in interstate commerce on completion by the employer. In only one decision, the *Consolidated Edison* case, has this Court even referred to purchase of supplies and equipment in discussing the jurisdiction of the Board, and in that case the Court laid such facts "on one side" without indicating whether they were material upon the jurisdictional question.

The decisions of the lower Federal courts but emphasize the limitation fixed by this Court in the *Schechter case.*[4]

The case of *National Labor Relations Bd. v. Idaho-Maryland Mines,* 98 F. (2d) 129, 131, a decision of the Ninth

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[4] Mooresville Cotton Mills v. National Labor Relations Bd., 94 F. (2d) 61, 62, Newport News Shipbuilding & Dry Dock Co. v. National Labor Relations Bd., 101 F. (2d) 841, 843, were concerned with raw materials which became part of the product shipped in interstate commerce. While the Newport News case refers to equipment, the equipment was used for repair work on interstate instrumentalities. National Labor Relations Board v. Abell, 97 F. (2d) 951, 954, directly involved raw materials, and the "supplies" (information and advertisements) were the very subject matter of an interstate business and used substantially in the form in which they were secured.

Circuit, is directly in point. In that case, the finding of the Board with reference to importation of supplies and equipment was as follows:

> "The record indicates that the respondent annually purchased supplies and equipment produced in and transported from points outside of the State of California, to an amount in the neighborhood of $125,000." 4 N. L. R. B., p. 789 (1938).

This finding is even stronger for jurisdiction than the finding made by the Board in the instant case, yet the Ninth Circuit Court held that such purchases did not confer jurisdiction.

The Board's "interstate supplies" position can be sustained only if this Court rejects the rule of the *Schechter* case and the "direct effect" requirement and adopts the *sine qua non* theory of causation. That theory would bring within the Board's jurisdiction every activity which may be said to be a necessary or natural preliminary to production. For instance, the employees of a local contractor erecting a building to be used for the production of goods to be shipped in interstate commerce would be within the Act if the employer bought from outside the state hammers, saws and other equipment necessarily used in the erection of the building. It is true the contractor, as in the instant case, is only next in line to the shipper, but if jurisdiction depends upon physical position, it may be acquired simply through "tacking". With such "House-that-Jack-built" reasoning the orbit of the Board's jurisdiction

will be so far extended as to include not only every industry of any importance, but a host of activities which have been regarded from time immemorial as local and entirely unconnected with "commerce" in its usual sense.

Jurisdiction is also claimed because it is said the interstate shipment of Bunker Hill's products, silver, gold, lead, and copper, may be diminished if there should be a stoppage of work at Petitioner's plant. This Court has many times held that the mere reduction in the supply of an article to be shipped in interstate commerce is ordinarily an indirect and remote obstruction to that commerce, and this rule was created in cases where the product shipped was the product produced.[5] Certainly where the product shipped is not the one produced, an even stronger presumption of remoteness arises. At any rate, here, as in the case of interstate shipment of supplies or materials, the Board must establish some direct, proximate connection between Petitioner's activities and the shipments by Bunker Hill.

The claim is not supported by the Board's findings of fact. While it is true that jurisdiction may be found even if there is no proof of a reduction of shipments in interstate commerce due to a particular labor disturbance (*Jones &*

[5] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 546, 547; United Leather Workers Intern'l. U. v. Herkert and M. T. Co., 265 U. S. 457, 465; Industrial Assn. v. United States, 268 U. S. 64, 80; United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 408.

Laughlin case), the Board is nevertheless required to find as a fact that the cessation of production necessarily results in the cessation of the movement of the Bunker Hill's manufactured product in interstate commerce. *National Labor Relations Bd. v. Fainblatt*, 306 U. S. 601, 604, 605. Upon this question, the only finding of the Board is as follows: "We find that the activities of the respondent set forth in Section 3 above, occurring in connection with the operation of the respondent described in Section 1 above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states, and has led and tends to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce." (R. 251.) Section 1 of the findings contains statements concerning the nature, character and extent of Petitioner's operations. In that section there is no statement that a stoppage of work at Petitioner's plant had reduced or would reduce Bunker Hlil's shipments. Section 3 relates only to the activities of Petitioner of which complaint is made. Therefore, the foregoing finding is in reality a mere statement that the unfair labor practices of an operator like Petitioner burden and obstruct commerce and the free flow of commerce. This is not a finding of fact, but a mere conclusion of law *Newport News Shipbuilding & Drydock Co. v. Schauffler*, 303 U. S. 54, 57; *Saginaw Broadcasting Co. v. Federal C. Com.*, 96 F. (2d) 554, 560.

The failure of the Board to make a finding with respect to the relation of stoppage of work to cessation of shipments

completely destroys its jurisdiction.[6]

Even if the decision of this Court permitted examination of the record when the findings of fact are insufficient, no evidence would be found that cessation of work at the Petitioner's mine would necessarily result in diminishing Bunker Hill's shipments. There was no evidence that the labor dispute in issue had any effect upon Bunker Hill's activities. In fact, the record is precisely to the contrary. In August, the month of the strike at Petitioner's mine, the shipments of Bunker Hill actually increased over the average before that time (Bd. Exs. 10-C, 10-F, R. 356, 358). Also, in August, Bunker Hill received 230 cars of ore (R. 3050), which was considerably over the average of the three preceding months (May, 176 cars (R. 3049); June, 204 cars (R. 399); July, 199 cars (R. 400). In the face of such positive evidence, we should not be permitted to guess what may be the effect of cessation of work at Petitioner's mine. It can be said that because some of Bunker Hill's product during some indefinite period of time contains 20 per cent by weight of the matter contained in Petitioner's ore, therefore, if the Petitioner's operations cease, there may be an interruption at some indefinite time in the flow of some of the basic substances contained in the original product. Such an interruption could occur only under circumstances not disclosed by this record—such as, that the interstate shipments by the Bunker Hill were dependent upon Petitioner's continuing its operations, as the instrumentalities

[6] See cases cited in Brief p. 4).

of interstate commerce were dependent upon the Edison Company (the *Consolidated Edison case* 305 U.S. 197, 220). Such a statement certainly fails to meet the test of direct, immediate, substantial and necessary effect. *National Labor Relations Bd. v. Fainblatt,* 306 U. S. 601, 604. "Courts deal with cases upon the basis of facts disclosed, never with non-existent and assumed circumstances." *Associated Press v. National Labor Relations Bd.,* 301 U. S. 103, 132.

Assuming that the Board had found that cessation of production by Petitioner would diminish interstate shipments of Bunker Hill's product, the relation between Petitioner's activities and interstate commerce would nevertheless be remote, contingent, and merely a "distant repercussion".

Petitioner's product does not at any time move in interstate commerce. The product moved by Bunker Hill in interstate commerce differs substantially in physical and chemical content, quality and value from that produced by Petitioner, and is made so by the active intervening agency of the independent purchaser. The purchaser mingles Petitioner's ore with the ore of many other mines (R. 387, 1947, 1954). All of the commingled ore is consumed in the smelting process and the products finally shipped are only 20 per cent by weight of the original mass (R. 2928). Between the time when Petitioner sells its product to Bunker Hill, and the time when Bunker Hill ships its own product

in interstate commerce, long, varying and indefinite periods elapse. The process of producing silver and other metals from Petitioner's ore itself takes at least three weeks (R. 348) and, in addition thereto, ore purchased from Petitioner remains in Bunker Hill's bin from one to six months or longer before it is converted (R. 1931, 1956, 1958). Petitioner at no time has any interest in or control over that product (R. 1930, 1933, 1942-3, 1958-60). There is no way of knowing how much of the metal produced from the commingled mass of ores comes from ore purchased from Petitioner, nor what happens to the metal, nor for how much it was sold, nor where it was sold (R. 1930, 1944, 1955, 1957-8).

The decisions of this Court under the Act fix what must inevitably be the limit of the Board's jurisdiction as far as shipments of the manufactured product are concerned. In the *Jones & Laughlin* case, the product finally shipped in interstate commerce was the product of the person charged with violation of the Act and no change was made in it after it left his hands. In the *Fainblatt* case the product finally shipped was that made by the Fainblatts, of whose operations jurisdiction was sought. In the *Bradford Dyeing Assn.* case, the *manufacturer's product* moved immediately in interstate commerce; and the same may be said of the products involved in *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49, 53, 54; *National Labor Relations Board v. Friedman-Harry Mark Clothing Co.*, 301 U. S. 58, 72, 73.

In the *Jones & Laughlin* case, this Court said that it is

the effect on interstate commerce which is important and not the source of the injury; in the instant case, no relation to interstate commerce can be found even by tracing Bunker Hill's product to its original source. If such tracing may be done, the Board will have jurisdiction of every source and every operation which has contributed to the making of a product ultimately shipped in interstate commerce, no matter how remote. Petitioner's ore is consumed in the smelting process. So far as Petitioner is concerned, the ultimate consumer of its product is Bunker Hill. It is true that the product shipped by Bunker Hill contains some elements of Petitioner's product, but any product always contains elements of other products. Petitioner's product is related to the product shipped by physical and chemical laws, and not otherwise. The only proximity is that Petitioner's activities lie next to those of one who is subject to the Act, but, as in the case of interstate purchase of supplies, if jurisdiction may be acquired through such proximity it may be traced through intervening operations and changes in the original product indefinitely to furnish totally unlimited jurisdiction.

There is, of course, a relation between smelting and the mining of ore, but, as a matter of practical experience, they are independent activities. Many concerns are engaged in nothing but smelting and others only in mining. The two operations differ materially. The men who work at the plant of a concern like Bunker Hill have different skills from those engaged in the mining of ore. The work

of the men at the Bunker Hill plant is not purely formal, mechanical, temporary, and incidental; it is fundamental. It involves the addition of chemicals, chemical reactions, absorption of materials, and loss of weight (80%) through a complicated catalytic process which finally results in an entire breakdown of Petitioner's product into various end products—silver, gold, lead and copper dross. It is not properly described as "processing", though various processes are used. It is in a real and legal sense manufacture, for "manufacture is transformation—the fashioning of raw materials into a change of form for use." *Kidd v. Pearson*, 128 U. S. 1, 20. See, also, *Utah-Idaho Sugar Co. v. Federal Trade Com.*, 22 F. (2d) 122, 124-6, where the transformation of beets into beet sugar was held to be manufacture. "To find immediacy here is to find it almost everywhere," for there can be no more fundamental break in the chain of causation than that through which a new product is manufactured, and there can be no more important manufacture than the conversion of raw materials into articles of commerce. This view was expressed in 39 Columbia Law Review, 818, 834, 835, where in relation to a situation similar to that in the instant case, after discussion of the *Jones & Laughlin, Santa Cruz* and *Fainblatt* cases, the writer says: "It seems likely that the Court will consider such an effect too remote." (Citing *National Labor Relations Board v. Idaho-Maryland Mines*, 98 F. (2d) 129).

While the *Idaho-Maryland Mines* case is distinguishable, as the government made no sales in commerce, the

Ninth Circuit Court nevertheless said that the result would have been the same if the government's activities had been commercial, and this case has been generally viewed as being applicable to intervening manufacture.[7] The decision must therefore be viewed as in point, and in conflict with the instant case.

Giving due weight to such differences as there may be between the rate, tax, Sherman Act, and "stream of commerce" cases and the instant case, they nevertheless do emphasize the limits of interstate power so plainly indicated in the decisions of this Court arising under the National Labor Relations Act. The line is quite clearly drawn in *Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 151, 152 and *Baltimore & O. R. Co. v. United States*, 15 Fed. Supp. 674, 676. In the *Baltimore & O. R. Co.* case, Judge Learned Hand said: "The determining factor, as we take it, was that the raw material was made into a new article at the stop; it can hardly have been crucial how long that took, though undoubtedly the length of time required was striking." The *Arkadelphia* case seems close authority for Petitioner's position because it distinguishes the case of *Swift & Co. v. United States*, 196 U. S. 375, upon which *Stafford v. Wallace*, 258 U. S. 495, was based, the court even going so far as to say, with respect to the *Swift* case and other cases cited in *Stafford v. Wallace*, that the distinction "is so evident that particular analysis may be

[7] 52 Harvard L. Rev. 658; 39 Columbia L. Rev. 934; 37 Mich. L. Rev. 938.

dispensed with." (p. 152). The *Arkadelphia* case is cited in *United Leather Workers Intern'l. Union v. Herkert and M. T. Co.*, 265 U. S. 457, 465, as affirming the "indirect effect" rule established by *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 408.

Cases like *Southern Pacific Terminal Co. v. Interstate Commerce Com.*, 219 U. S. 497, are based on factual situations much different from the instant case, for there the product was "in" interstate commerce; there was an actual interstate movement. The cases nevertheless do indicate that even where the interstate journey has begun the interstate power stops when there is a change in the product unconnected with the purposes of the transportation itself, or where there is a substantial intervening period during which the shipper handles the product for purposes unconnected with transportation. In the *Southern Pacific Terminal Co.* case, *supra*, the processing was for the purpose of furthering the transportation of substantially the same product; it was a simple operation, and the continuity of transport was only temporarily stopped. In *McFadden v. Ala. Great Southern R. Co.*, 241 F. 562, 566, the court said that the concentration of cotton at the railroad's presses did not end the transportation, "but rather indicated the contrary, that compression to reduce bulk, being a thing desired and a right reserved when transportation was intended to be continued, the stop at Birmingham . . . was merely the interruption necessary to prepare the cotton for a journey to be continued,"; saying, further: "It was, how-

ever, but an incident in the transportation of a commodity of that kind,"; citing the *Southern Pacific Terminal Co.* case. See, also, *State of Texas v. Anderson, Clayton & Co.*, 92 F. (2d) 104, 107. And, in *Missouri Pac. R. Co. v. Schnipper*, 56 F. (2d) 30, 31, 32, a shipper attempting to obtain the privilege of stopover in transit for creosoting treatment of ties was held to have lost that privilege because he held the ties for an indefinite period of time before creosoting, the ties being held for seasoning so that they could be creosoted, being then separated into seasoned and unseasoned ties, and the creosoted ties being held by the shipper thereafter until needed to meet his maintenance and construction requirements. The point was that the purposes for which the owner withdrew the ties from commerce were not incidental to, or connected with the transportation or the means used therefor, but were merely to enable him to make better use of the ties.[8]

So here, Bunker Hill consults its own business interests in converting Petitioner's product. What it does is not incidental to transportation, either in nature or point of time. Bunker Hill's plant is not merely a point of rest for Petitioner's product; it is, in fact, a point of extinction.

The principles applicable where there is a substantial change in the product are applicable also where intrastate

[8] See, also, Bacon v. Illinois, 227 U.S. 502, 513, 514; and General Oil Co. v. Crain, 209 U. S. 211, 229, 230.

activities are divorced from interstate commerce, as they are in this case, through the complete transfer of title of Petitioner's product to Bunker Hill.

When complete title to and possession of the goods is handed to a purchaser within the state, and the seller has no connection with or control over a subsequent movement, interstate or otherwise, and the purchaser, suiting his own convenience and dependent upon his own business relations, ships the goods later through interstate commerce to his own customers, there is no case which hooks up the transportation or sale to the purchaser with interstate commerce or permits regulation of the activities of the seller. The point is brought out clearly by *McCluskey v. Missouri Valley & N. R. Co.*, 243 U. S. 36, 38-40, where the court distinguishes *Texas & Nor. Co. v. Sabine Tram Co.*, 227 U. S. 111, *Southern Pacific Terminal v. Interstate Commerce Com., supra* and *Railroad Com. v. Worthington*, 225 U. S. 101. In the *McCluskey* case a logging railroad, over which its owner carried its own logs in its own cars from its own timber land within the state to a tidewater point, also within the state, where such logs were dumped into the water and sold, some of them going to points outside the state, was held not to be engaged in interstate commerce. To the same effect see *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 520; *Arkadelphia Milling Co. v. St. Louis S. W. R. Co.*, 249 U. S. 134, 151, 152; *Coe v. Errol*, 116 U. S. 517, 527-8.

The *Santa Cruz* case itself confirms the distinction

noted in these cases, for in that case the employees brought under the Act actually handled the shipments, putting the goods "directly into the equipment of the principal carriers." (303 U. S. at page 461). Obviously, the fact that there was a technical transfer of title had nothing to do with the actual movement. The goods were not in fact taken into the possession of the purchaser within the state. As the court said, there "the *actual* movement is interstate." (p. 463). In the *Fainblatt* and *Bradford Dyeing Assn.* cases, the movement of the goods, even with the intervening processing, was at all times under the control and direction of the owner, and the goods which were finally shipped were "put up" for interstate shipment by the processor, who it may fairly be said was the direct motive power introducing the goods into the channels of interstate commerce. The *Fainblatt* case necessarily limits the doctrine to "the manufacturer who regularly ships his product in interstate commerce" (306 U.S. 601, 608).

It is no answer to say that the *Santa Cruz* case held that "sales to purchasers in another state are not withdrawn from Federal control because the goods are delivered f. o. b. at stated points within the state of origin for transportation" (p. 463). In the first place, the Court said: "and the place where the manufacturer makes his sales is not controlling if the sales *in fact are in interstate commerce*". (p. 465). And in each one of the cases relied on in the *Santa Cruz* case, the basis of the decision was, as stated in *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 466,

"*If the actual movement is interstate,* the power of Congress attaches to it and provisions of the Act to regulate commerce invoked for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, applies." In such cases, the court will not allow a mere change of title by billing to interrupt the transit or prevent Federal power from attaching. In *Texas & Nor. Co. v. Sabine Tram Co., supra,* cited also in the *Santa Cruz* case, the limitation of the doctrine with respect to change in billing is made clear by its distinction of *Gulf C. & S. F. R. Co. v. Texas,* 204 U. S. 403. The controlling fact in the latter case was that the intrastate movement was independent of the interstate movement and its independence consisted of the acquirement of full title and control of the product shipped by the company which reshipped it. The fact is that the transfer of title in such cases is but an incident—often purely a formal incident—of the transportation itself.

Though probably an extreme case in its facts[9], the *Consolidated Edison* case was based on the same close physical connection with interstate movement as is found in the *Santa Cruz, Fainblatt* and *Bradford Dyeing Assn.* cases where the product of the manufacturer itself moved

[9] See 37 Mich. L. Rev. 938-40, where the note writer said: "The difficulties in setting adequate boundaries to the Board's jurisdiction once the principle of the Edison case is fully accepted, in addition to the dubious propriety of thus widening the scope of Federal regulatory power, militates strongly against the extension of the theory of that case much beyond its facts upon which the decision is supportable".

in interstate commerce. In the *Edison* case, instead of the actual movement of goods in interstate carriers, there was a direct physical connection between the cessation of the Edison Company's activities and the operation of instrumentalities of interstate commerce which were dependent upon the Edison Company's power (305 U. S. 197, 220). It was conclusively shown that if there was an interruption through industrial strife of the service of the petitioning companies, "instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships, whose docks are lighted and operated by electrical energy, would be greatly impeded." It is little wonder that the court said: " 'Such effects we cannot regard as indirect and remote.' " (p. 221). In *United States v. Rock Royal Co-operative*, 307 U. S. 533, 568-9, the commodity (milk) was bought for use beyond state lines and its sale was held to be part of interstate commerce, the marketing of the milk being inextricably intermingled with the marketing in the area of milk which moved across state lines. Under such circumstances, Federal Power to regulate sales was upheld.

In the instant case, on the other hand, there is no "immediate" effect of any kind, no impending catastrophe, no interstate movement or sale of a manufactured product, no connection with interstate instrumentalities, no "inex-

tricable mingling" with the interstate transportation of similar products, no effect on others beyond the borders of the state or those engaged in the same business and moving their products interstate; in short, there is nothing but an independent, local activity whose connection, if any, with interstate commerce is purely incidental and contingent. Intervening between the activities of Petitioner and interstate commerce are (1) extinction or complete conversion of the product; (2) long and varying periods of time; (3) complete transfer of title and control; (4) an independent actor engaged in a different business. If the presence of these elements does not make an activity "remote", it is hard to conceive of anything that will.[10]

Since Petitioner's product never moves in interstate commerce and there is no showing that instrumentalities of commerce depend upon a continuance of its activities nor that the interstate shipments of the Bunker Hill are so dependent, there is no connection between those activities and interstate commerce, unless it be contended that possible withdrawal of some of Petitioner's raw material will have some effect on the interstate market for silver, gold, copper or lead. This obviously remote effect has no foundation in the record and was repudiated by this Court in the *Schechter* case. (295 U. S. at pages 520-1, 542-50). Certainly under the circumstances here disclosed the activities

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[10] In 52 Harvard L. Rev., 646, 648, the writer says: "It is difficult to find a direct effect where the goods are subject to further manufacturing or processing by the intermediary."

of Petitioner fail completely to meet the requirement that a direct, immediate and substantial effect upon interstate commerce must "clearly appear."

The application of the Federal power in cases like the one before this Court may be defended upon the ground that there is now no local industry; that our modern complex industrial system is necessarily national. 47 Harvard L. Rev., 1365. In fact, it has been suggested that "the doubt now is whether there are any limits on the Board's jurisdiction in the industrial or commercial spheres." 51 Harvard L. Rev. 1123. Simple as such solutions are and attractive as they may be to those primarily interested in economic theory, the framers of the Constitution certainly never intended that the states should have the power to regulate inherently local industry, if at all, only in the most trivial cases.

Petitioner, throughout the difficulties which gave rise to this litigation and thereafter, has guided its course upon the supposition that despite the contrary suggestion of an occasional erudite law writer there are constitutional limitations upon the Board's jurisdiction of industry. Petitioner believes that unless the hypothesis of a completely centralized government be accepted the facts of this case furnish but flimsy foundation for the exercise of Federal power. The decisions of this Court, properly articulated, have already pointed out the limits of Federal jurisdiction, and those limits may here be convincingly applied to pre-

vent further attempts by administrative bodies to obliterate the constitutional distinction between what is national and what is local. The alternative, Petitioner submits, is to give the Board practically unlimited jurisdiction over labor relations, "in subversion of the fundamental principle of the Constitution."

II. THERE IS DEPRIVATION OF DUE PROCESS OF LAW AND LACK OF SUBSTANTIAL EVIDENCE TO SUSTAIN FINDINGS UPON QUESTIONS OF UNIT, MAJORITY, AND REFUSAL TO BARGAIN.

The Board and the Circuit Court held that Petitioner had refused to bargain with the Union as the exclusive representative of all of its mine and mill employees, excluding supervisory, technical, and clerical employees, though no one had ever requested bargaining rights for such unit, no charge had ever so claimed, and no complaint so alleged. No notice was ever given that the Board or any one else so contended. No evidence was introduced with reference to any such claim.

Basically, this case involves the application of a few fundamental doctrines of law to the undisputed facts.

On June 28, 1937, a committee of nine men, three representing Local 18, three representing Local 14 and three representing the International Union (R. 435), called on Petitioner (R. 434). The committee was led by one McGuire, the only member of the committee who testified,

and it demanded that Petitioner recognize and bargain with the International Union as the exclusive bargaining agent for *all* of Petitioner's employees.

McGuire testified the Union demanded "representation of all the employees of said mine" (R. 437); that it demanded to be recognized as "the sole collective bargaining agent of all the employees of the Sunshine Mining Company" (R. 475-6).

"Q Did the committee, as such, ask the management that they be the sole bargaining agency for the Sunshine Mining employees at that time? . . .

"A That question was asked at all meetings." (McGuire, R. 493).

Petitioner's witnesses testified to the same effect, that the Union wished "to be the SOLE REPRESENTATIVES of all Sunshine employees" (Resp. Ex. 76, R. 2839); that the "Union had petitioned the National Labor Relations Board to be certified as the bargaining agency for all of the Sunshine employees" (R. 2902).

The Union's demands were presented in the form of a written contract (R. 436), and the only discussion which took place was with reference to that contract (R. 436, 437, 438; Bd. Ex. 20, R. 440, 442, 443, 470, 471, 473).

The contract (Bd. Ex. 19, R. 448) spoke for itself: it was to cover "rates of wages, hours of labor, and other conditions of employment, of all men employed in and about the plants of the Company" (R. 448-9).

It provided that Petitioner "hereby recognizes the International Union . . . as the representative of all of the employees of the Company for the purpose of collective bargaining" (R. 449-50), and that "The Company agrees to employ only members of the Union in good standing." (R. 450)

There was never any modification of this demand (R. 497). It was recognized by the attorneys for the Board to be the only demand, as shown by the following question they asked: "Q. Had you, in the meantime, read the Wagner Act in the event, Mr. Leisk, you refused to recognize the Union as the sole collective bargaining agent *for all the employees of the company?*" (R. 2926).

The only refusal ever made by Petitioner was a refusal to recognize the Union as the sole and exclusive representative of all of its employees. As stated by McGuire, the Union organizer, the Petitioner "would not recognize the Union as the bargaining agent of all the employees of the Sunshine Mining Company" (R. 443), and "would not recognize the Union as the sole collective bargaining agent of all the employees of the Sunshine Mining Company" (R. 475-6), and "would not recognize the union as the collective bargaining agent of all the employees of the Sunshine Mining Company." (R. 493-4).

Petitioner's refusal was based openly and frankly on two grounds: first, it doubted the fact of the Unions' majority status; second, it doubted the applicability of the Act to it.

The Board's witness, McGuire, testified that at the first meeting between the Union committee and the Petitioner,

> "In the discussion of Article No. 1, which deals with the union's right to collective bargaining and representation of all the employees of said mine as the bargaining agent, Mr. Leisk stated that he doubted that the Union had a majority of the employees of the Sunshine Mining Company" (R. 437),

and

> "At the meeting of June 28th Mr. Leisk stated that he did not believe—he doubted that the Union had a majority of the employees" (R. 493).
>
> See, also, Record, page 473.

McGuire testified further that at said meeting Leisk stated the Act did not apply to Petitioner. In addition, Petitioner wrote the Board early in July that it did not believe that its activities were subject to federal regulation (Resp. Ex. 101, 103; R. 2911, 2914-5).

No evidence to support the Union's claim of a majority was ever submitted to Petitioner (R. 2813, 2826, 2868), though at all times it doubted the majority status of the Union (R. 2816-7).

On July 15, 1937, the Union filed a petition with the Board to be certified as the sole and exclusive representative of *all* of Petitioner's employees (R. 446, 2902) and the Board sent one of its representatives to investigate this petition, and charges that had been made in June. After some investigation he informed Petitioner of the charges

and the petition for certification, and, with reference to the charges, said "that there was not any use in his going into an investigation of the complaint until the question of the status of the company as regards jurisdiction of the Board had been determined" (R. 2903), and "that there was a question as to the jurisdiction of the Board" in this case (R. 2902).

With reference to the representation proceedings, he told Petitioner that there were two courses open, "to agree to a consent election", or to "leave the matter to the Board to determine by its regular procedure whether or not an election would be ordered" by it (R. 2902-3). He further stated that Petitioner was wholly within its rights in choosing either course, and that he could appreciate why it would choose the regular procedure (R. 2903). At that time the Board would not certify the victor in a consent election as the representative of a proper unit (R.3101).

After due consideration Petitioner decided that it would be better for the Board to hold its regular proceedings under Section 9 of the Act. Petitioner's position is well expressed in Respondent's Exhibit 76, Record 2840, where, after calling attention to the Union's demand to represent all employees, it is said:

"5. As a result the Labor Board has made two suggestions to the company as follows:

a. That a consent election be conducted by the Board without any investigation of the merits of the petition, or

b. That the Board proceed along the lines provided by law to conduct a hearing to determine whether an election shall be ordered.

6. The company prefers that the Board take the latter course. (b).

7. The union not satisfied to have the question of election determined by regular procedure of the board has ordered the strike vote."

It will be noted that at all times the only unit specified by the Union was that of *all* the employees, and that this was the unit designated in their petition as provided in the Board's Rules (Art. III, Sec. 2(3), Appendix to Petition, p. x), a wholly proper unit by the plain terms of the statute (Sec. 9(b) and 2(3)), and a unit which included all of petitioner's employees who were eligible for union membership (Bd. Ex. 59, R. 1179), i. e., "all persons working in and around all mines . . . mills", etc. (R. 1179-80), including all supervisory, clerical and technical employees, as well as all the rest of Petitioner's employees except officials and executives (R. 1182). It was solely with reference to this admittedly proper unit that Petitioner refused to bargain.

Up to this time all parties, Unions, Board, and Petitioner, were in agreement as to what constituted the proper unit. The only issue was: Did the International Union represent a majority of all of the employees.

Petitioner was aware of the duty imposed upon it by the Act and this court's opinion in the *Jones and Laughlin*

case (301 U. S. 1, 44) not to deal with any minority group, and the rule enunciated by the Ninth Circuit that Petitioner was "required . . . to refrain from entering into collective labor agreements with anyone other than their true representative as ascertained in accordance with the provisions of the Act" (*National Labor Relations Board v. Union Pacific Stages*, 99 F. (2d) 153, 159). Petitioner believed that by agreeing to a regular statutory proceeding, it was performing its duty as declared by the statute and the decisions of the court.

Thereupon the Union struck, and the Board found that the strike was caused by Petitioner's refusal to recognize and "bargain collectively with the Union as the exclusive representative of its employees in an appropriate bargaining unit" (R. 237). What that unit was the Board studiously refrained from finding.

Thereafter and while the strike was still pending (R. 14, 89, 2883), the International Union filed an amended charge (R. 1), in which it alleged that the appropriate unit was *all* the employees, that *all* the employees were represented by a joint committee of the two locals which were affiliated with it, and that petitioner had refused to recognize and bargain with such joint committee as the exclusive representative of *all* of its employees (R. 4).

After investigation, and in purported compliance with the statutory mandate to "issue and cause to be served . . . a complaint stating the charges" (Sec. 10(b)), the Board

served its complaint (R. 8). It alleged that the only labor organizations involved were Locals 14 and 18 (R. 10), that the unit appropriate for collective bargaining was *all the employees,* excluding "supervisory officials, executives, technicians, office employees" (R. 10), that a majority of this unit was represented by "Locals 14 and 18, jointly" (R. 11), and that Petitioner had refused to bargain with said Locals 14 and 18 as such exclusive representative (R. 11, 12).

Here the unit was changed from *"all employees"* to "all employees" less the supervisory officials and executives (who are not employees under the statute), and less technical and office employees (who are employees under the statute).

To this complaint, in pursuance to the statute, Petitioner answered and joined issue as follows: As to the unit, it admitted that the proper unit was all its employees, excluding supervisory officials and executives, but denied that the technical and office employees should be excluded (R. 30). In other words, the unit for which bargaining had been demanded, the unit described in the proposed contract, the unit for which certification was requested, and the unit mentioned in the charge, was agreed to be the proper unit. Petitioner joined issue only upon the Board's claim that the technical and office help should also be excluded.

In its answer Petitioner denied that the two local unions represented and had ever demanded bargaining

rights for the unit described (R. 31, 32).

Upon these issues the hearing was held. During the course thereof the Board repeatedly stated that the above issues were the only issues as far as unit, representation and refusal to bargain were concerned (R. 977-8, 813, 854, 920, 936).

The only evidence at the hearing upon the issues of the proper unit, and of whether or not a majority of the employees had selected a representative, was:

1. The constitution of the Union (Bd. Ex. 59, R. 1179);

2. Lists of the members of Locals 14 and 18 and of employees who had designated either one of the locals or the International as bargaining agent (Bd. Exs. 51 and 52, R. 1005, 1034), without any designation of the employment of such persons;

3. Petitioner's payrolls for June 28, 1937 (Bd. Ex. 54, R. 1043), July 9, 1937 (Bd. Ex. 55, R. 1063), July 31, 1937 (Bd. Ex. 56, R. 1082) and August 2, 1937 (Bd. Ex. 57, R. 1106), without any designation of the occupation of the men listed thereon; and

4. An exhibit explaining these payrolls, showing the names of mine shift bosses, mine foremen, shaft jiggers, department heads, and a few other employees who did not turn in daily time cards, but who were on the payroll (Bd. Ex. 54A, R. 1158).

That there was no question of any different unit from

that of "all employees" is clearly shown by the procedure adopted in submitting evidence of the Union's claim of majority representation. A great deal of time was taken in checking Petitioner's payrolls against the Union records, and *vice versa*, but absolutely no attention was given to the employee's particular occupation or job.

According to the procedure followed at first, which was agreed on by all parties and the examiner, the Union secretaries read the names of the men they claimed, and Petitioner's timekeeper consulted the payroll to see if the claimed member was an employee (R. 602-3, see, also, R. 595-6)—all without any attention as to the employee's job.

This checking procedure was evidently not very satisfactory, so the Board had each union prepare an exhibit which showed all of its claims as to membership and bargaining designations (R. 1003, 1033), and these were finally introduced in evidence by the Board as Exhibits 51 and 52. These were immediately followed by the total payrolls of Petitioner (Bd. Ex. 53-57), and that is the only evidence as to the majority representation of the unit. It showed nothing as to the "mine and mill employees".

The Big Creek Industrial Union was allowed to intervene in the proceedings (R. 64), and it alleged that it represented, first, a majority of all of Petitioner's employees, and second, a majority of its mine and mill employees (R. 56, 72, 73, 78). The only issue raised at the hearing, with reference to mine and mill employees, was whether or not

they were represented by the Big Creek Union at the time of the hearing in September and October, 1937, and the Board refused to recognize this issue in any way whatsoever.

The evidence in support of this claim was the August 15, 1937, payroll of 419 employees (Resp. Ex. 62, R. 2106); the membership lists of the Big Creek of its members who had worked before the strike (Stipulation R. 2119-27, names R. 2128-37, Int. Ex. 11, R. 2226-35); the list of those working before the strike who, while not joining the Big Creek, had designated it as their agent (Int. Ex. 14, R. 3019); and the membership and designation lists of the Big Creek of men who had been hired after August 10, 1937 (Int. Ex. 27, 52, R. 3025 and 3033). The names and jobs of all men included therein are designated on these lists. They included the names of only 126 men claimed by the unions, and of these 126 (included in Bd. Ex. 51 and 52, R. 1005, 1034), 16 were not "mine and mill employees", and 1 Harris Fraser, was a shaft jigger or supervisory employee (Bd. Ex. 54A, R. 1158).

From these exhibits it appears that, in addition to mine and mill employees, Petitioner's employees include: surface workers, machine shop employees, clerical workers, engineers, electric shop workers, watchmen, truck drivers, shovel runners, assayers, carpenters, blacksmiths, janitors in dry, truck helpers, painters, plumbers, general handy men, ore samplers, stenographers, accountants and time keepers.

The occupations of the men claimed by the Union other than the 126 above mentioned do not appear; some may have been mine and mill employees, or all may not have been, but the record does not show whom. With the possible exception of the Big Creek Union, no one cared what their occupations were, since no issue had been raised on that point.

All this evidence was treated by the Board as being wholly immaterial since it did not consider membership of the Big Creek an issue (R. 1992). The only evidence which it recognized referred to union membership, as of June 28, July 9, and August 2, 1937 (R. 1992-3). (The Big Creek was not organized until August 20, 1937 (Resp. Ex. 114, R. 1833, 2141)).

As to the representative of Petitioner's employees, there was no claim made in the charge or the complaint, nor any attempt to prove by evidence that the International Union was a representative of a majority. The Board repeatedly specifically stated that the only issue was as to whether or not a majority of the employees had selected the *two locals jointly* (R. 977-8, 813, 854, 920, 936).

When the International Union filed the charge and alleged under oath that a joint committee of the two locals represented a majority of all employees, it was judicially admitting that it did not represent the unit (R. 4).

After the hearing, when the Board's amended complaint was filed to conform with the evidence (R. 82, 2956-8), the

proper unit was still "all the employees", less "supervisory officials, executives, technicians, office employees" (R. 85). The only labor organizations involved were still "Locals 14 and 18" (R. 85). The majority of the employees had still designated "Locals 14 and 18, jointly, as their representative" (R. 86). It was still only such locals which had made the request to bargain, and it was still only that request, by said locals for such unit, which Petitioner had allegedly refused to grant (R. 86-7).

In January, 1938, the intermediate Report was filed (R. 97-139). It referred exclusively to the unit alleged in the complaint, that is, "all employees" less "supervisory officials, executives, technicians and office employees" (R. 124, 130), and completely failed to consider the nature of any employee's job or individual work.

This demonstrates conclusively which unit was in question and that there was no evidence to sustain a finding with regard to any other than "all employees." That was the only issue of which Petitioner had notice or an opportunity to meet.

Then, on July 1, 1938 (R. 260-1), Petitioner was served with the Board's order (R. 214), which completely misstated the pleadings and the record. It found that the complaint alleged that Petitioner had refused to deal with the International Union (R. 214), an untrue statement, and it listed the International Union and the Big Creek Union as the only labor organizations involved (R. 221-2), (though

in all the pleadings and at the hearing the International was not in question). It found that the International admitted "to its membership the mine and mill employees of the respondent", but that the Big Creek admitted "to its membership all the respondent's employees, including supervisory employees, who are not given any voting rights" (R. 222),—a palpable misstatement.

The only evidence in the record as to the membership requirement of the International Union, is Board's Exhibit 59, the constitution of the International Union, and this exhibit shows that ALL of Petitioner's employees are eligible for membership, with the possible exception of Mr. Leisk, the general manager. Every one of Petitioner's employees would be entitled to full voting membership in the International Union except Mr. Graham, the general mine foreman (R. 1179-80, 1182). The Big Creek membership, contrary to the Board's finding, was actually far more limited (R. 1840).

It is impossible to view this misstatement of the record with tolerance. It is impossible to pass it as a "mistake". It seems apparent that the Board made this false finding as a basis for its later finding that the International Union represented a majority of Petitioner's mine and mill employees.

The mechanics of this studied torturing of the record is clear,—the record shows the job classifications of all of Petitioner's employees, except the job classification of the

Union's members (Resp. Ex. 62, R. 2106; Int. Ex. 11, R. 2226; Int. Ex. 14, R. 3019-20; Int. Ex. 27, R. 3025; Int. Ex. 52, R. 3033). Listed on Exhibit 62 are 126, on Intervenor's Exhibit 11 are 90, on Intervenor's Exhibit 14 are 2, and on Intervenor's Exhibit 27 are 2 names who are not mine and mill employees.

By changing all men claimed by the Union into "mine and mill employees", the Board could deduct from the balance of the employees those who were not mine and mill employees, and by this process support its findings of a majority by "substantial evidence". However, it overlooked its own Exhibit 59, the constitution of the International Union (R. 1179-82), which shows conclusively that all Union members are not necessarily mine and mill employees.

Not satisfied with these erroneous findings, the Board proceeded to misstate the allegations of the complaint as to the unit, finding:

> "It is alleged in the complaint that the respondent's name (sic) mine and mill employees, excluding supervisory, clerical, and technical employees, constitute a unit appropriate for the purposes of collective bargaining. The respondent urged that the appropriate unit should include office and technical employees" (R. 227).

No such allegations are contained in any pleading.

This finding was made to create an illusion that Petitioner and the Board had agreed that the "mnie and mill" employees was the proper unit and that there was an issue

raised with reference to mine and mill employees, and the further illusion that Petitioner and the Board had agreed that "supervisory employees" should be excluded. No such claim had been made, though Petitioner did agree with the charge and the complaints that "supervisory *officials and executives*" (who are not employees under the statute) should be excluded from the unit of "all employees".

The Board, further attempting to bolster its conclusion as to "mine and mill" employees, found: "The mine and mill employees are paid on a daily or shift basis, while office and technical employees are paid on a regular salary basis" (R. 227).

This is simply a half truth. ALL of Petitioner's employees except technical and office employees and supervisory officials and executives, are paid on a daily basis, including all supervisory employees.

Piling error upon error in its efforts to lay the basis for placing employees in the "mine-mill" classification, the Board again deliberately found:

> "The respondent itself recognizes that a distinction exists between the mill and mine employees and the clerical and technical employees by carrying them on separate pay rolls" (R. 227).

This is simply a false statement. *All employees* except supervisory officials, executives, technical and office employees, but including all *supervisory employees*, are carried on one payroll.

By these findings the Board completed the foundation for its detemination of a majority.

But it had still another hurdle to pass—the nature of the demand made by the Union to represent "all" of the employees. It therefore proceeded against all evidence and the pleadings, to find, "the unit advocated by the Union and alleged in the complaint as appropriate" (R. 227), adding that the "evidence does not disclose any reason for departing from the unit claimed by the Union" (R. 228).

The Union had never claimed that any such unit was proper. It had claimed that the proper unit was "all the employees". Neither the charge, the complaint, the amended complaint, nor the intermediate report had ever alleged or even referred to such a unit, and no such unit had ever before been brought into the case.

Upon that shifting and untenable basis the Board found as a conclusion of fact, that the "mine and mill employees, excluding supervisory, clerical, and technical employees" was the proper unit (R. 228).

This error as to the unit was carried along throughout the findings. On page 230 the Board said: "This check discloses that on June 28, 1937, the Union represented approximately 300 employees in the *appropriate unit*". There is not a scintilla of evidence to support such a finding, not a word of testimony as to how many employees there were in the "appropriate unit" referred to by the Board, not a single piece of evidence as to how many of the members of

the local unions or the International Union were "mine and mill employees".

The same studied and careful disregard of the record was shown by the Board in considering whether there had been a refusal to bargain. It found as follows: "McGuire stated that the Union represented a majority of the respondent's employees and submitted two copies of a proposed agreement. Leisk stated that he doubted the Union represented a majority of the respondent's employees" (R. 234).

On this finding and one that thereafter Petitioner refused to bargain, the Board then determined that Petitioner "has refused to bargain collectively with the Unions as the exclusive representative of its employees in an *appropriate bargaining unit*" (R. 237), and "that the strike of August 2, 1937, was caused by the respondent's unlawful refusal to bargain."

It will be noted that the Board studiously avoided making any finding as to the unit for whom the demand for bargaining rights was made. It did not find that any demand or request was made to bargain with the appropriate unit established by it. It did not find that any one represented a majority in the unit for which bargaining was demanded.

The Board was confronted with documentary and testimonial evidence that the only bargaining right ever requested was "FOR ALL THE EMPLOYEES". It could

not find as a fact that the Unions represented a majority of that unit so it simply failed to make any findings at all with reference to that point.

However, the Board did find that the unit for which the Union demanded bargaining rights was "an appropriate bargaining unit" (R. 237). Since the Union had demanded bargaining rights only for "all the employees", the Board must therefore have concluded that "ALL OF THE EMPLOYEES OF PETITIONER" WAS AN APPROPRIATE UNIT. Only one request to bargain was ever made, and that was to bargain for all the employees. Only one refusal to bargain was made, and that was a refusal to bargain with the International Union as the exclusive representative of all of Petitioner's employees. When it found, therefore, that Petitioner refused to bargain with the Union "as the exclusive representative of its employees in an appropriate unit" it necessarily found that "all of the employees" was an appropriate unit.

The Union made a demand to be recognized as the exclusive bargaining representative of an appropriate unit; its rights to speak for that appropriate unit were questioned; and thereafter its demand was refused. This was followed by a strike, which strike was caused solely by that refusal.

Thereafter that unit was entirely forgotten. Yet Petitioner is found guilty of refusing to bargain with the Union for a unit it never heard of, for refusing to do that

which it was never asked to do. And the record conclusively establishes that the refusal Petitioner did make was proper, because the Union did not represent a majority in the unit for which it sought to bargain.

Upon the question of the proper unit, the designation of a representative, whether or not a majority had selected a representative, and whether or not Petitioner ever refused to bargain with a representative selected by a majority of its employees is an appropriate unit, this is the record. It clearly appears therefrom that Petitioner was not given notice of, nor afforded a hearing upon the charges of which the Board found it guilty.

There was no evidence nor issue to sustain its determination of what was the appropriate unit, to support its findings that the Union represented a majority of the mine and mill employees, or to fortify its holding that Petitioner refused to bargain with the Union as the exclusive bargaining agent of its mine and mill employees.

This Court has held that to constitute substantial evidence, it must be such as would sustain a refusal to grant a new trial in a case tried to a jury. *Pennsylvania Railroad Co. v. Chamberlain,* 288 U. S. 333, 343. It must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197, 229. ". . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion

sought to be drawn from it is one of fact for the jury". *National Labor Relations Board v. Columbian E. & S. Co.*, 306 U. S. 292, 300.

In this case the findings as to unit, majority, and refusal to bargain fail by a great margin to meet the test of substantiality.

The following is a summary of this record:

Petitioner had no opportunity to show:

(a) That the mine and mill workers was not a proper unit.

(b) That the Union did not represent such unit in June, July or August, 1937, or at the time of the hearing in September and October, 1937.

There is no evidence, substantial or otherwise, to support the following findings of the Board:

(a) That the "mine and mill employees" was a proper unit.

(b) That the Union represented a majority of such employees in June, July or August, 1937, or at the time of the hearing.

(c) That the Union requested or demanded bargaining rights for such unit.

(d) That Petitioner refused to bargain with the Union as the exclusive representative of the employees in such unit.

On the contrary, the record does show without contradiction:

(a) That the Union demanded bargaining rights for all of Petitioner's employees (Board made no finding).

(b) That Petitioner refused to recognize the Union as the exclusive bargaining representative of *all of its employees.* (Board made no finding).

(c) That the Union did not represent a majority of all Petitioner's employees. (Board made no finding).

(d) That "all of the employees" constituted a proper unit. (The Board so found (R. 237)).

(e) That at the time of the hearing a majority of any or all possible units was then represented by the Big Creek. (The Board made no finding).

No issue was formed, hearing had, nor notice given with reference to the following matters on which the Board made findings:

(a) Whether or not the "mine and mill employees" was a proper unit.

(b) Whether or not supervisory "employees" should be excluded from any unit.

(c) Whether or not the International Union had ever requested bargaining rights for any unit, and whether Petitioner refused to recognize it as the representative for any unit.

(d) Whether the International Union represented any of Petitioner's employees individually, or a majority of its employees in any unit.

(e) Whether any union represented a majority of Petitioner's mine and mill employees, or had ever requested bargaining rights for a unit composed of such "mine and mill" employees, less exclusions.

The Board made no findings upon the following issues raised by the pleadings:

(a) Whether, from the admittedly proper unit of "all the employees excluding supervisory officials and executives", there should also be excluded the "technical and office" employees.

(b) Whether such a unit was in fact or in law a proper unit.

(c) Whether Locals 14 and 18 represented a majority of the employees in such unit, at any time.

(d) Whether Petitioner refused to recognize Locals 14 and 18 as the exclusive bargaining agent of such unit.

(e) Whether, if Petitioner did so refuse, such refusal was wrongful.

This court has clearly delineated the requirements of due process. (See cases cited in Petition, pp. 31-4). Measured by that standard, the Petitioner has been denied every vestige of a fair hearing.

If an employer in a Labor Board case is entitled to such a fair hearing, and if the Board's findings must be sustained by substantial evidence, then the following parts of the Board's order must be set aside:

1(c), which orders Petitioner to cease and desist from refusing to bargain with the International Union as the exclusive representative of its mine and mill employees (R. 267).

2(c), which orders Petitioner to bargain with the International Union as the representative of the mine and mill employees and reduce the agreement, if one is reached, to writing (R. 268-9).

2(e), in part, which requires the posting of notices with reference to the International Union (R. 269).

Petitioner respectfully submits that the writ should issue.

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No. 352

In the Supreme Court of the United States

OCTOBER TERM—1940

SUNSHINE MINING COMPANY,
a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

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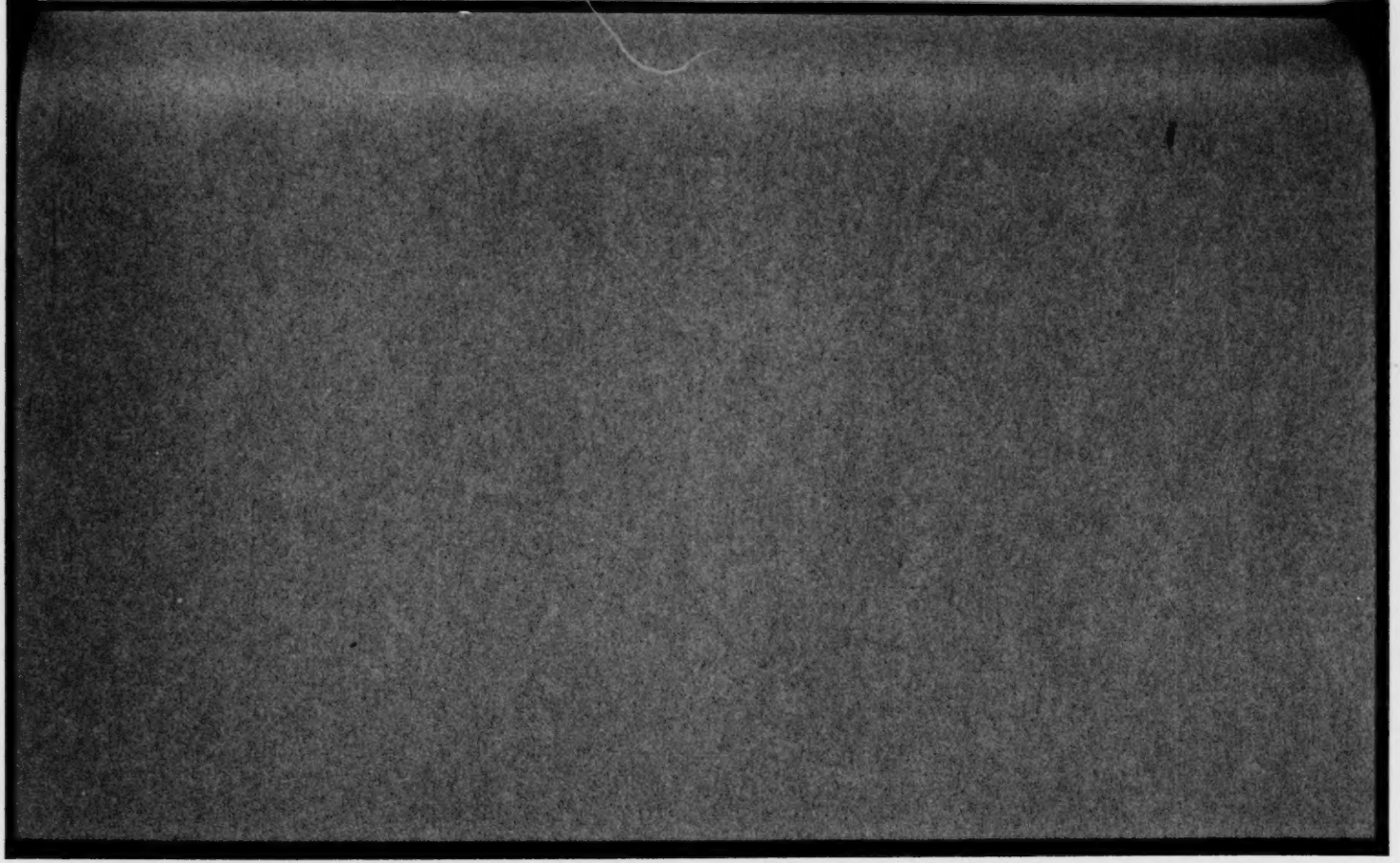

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PETITION FOR REHEARING

Petitioner, Sunshine Mining Company, respectfully petitions the court to reconsider its denial on January 13, 1941, of petitioner's application for a writ of certiorari, and grant it a rehearing.

Petitioner is constrained to do so, first, on account of the rapidly accumulating cases under the National Labor Relations Act and Wage and Hour Act raising the question of the power of Congress to regulate intrastate businesses which sell their entire output within the state of production; and, secondly, on account of the innumerable cases where employers, (like petitioner in this case), who honestly and in good faith and on reasonable grounds believe, either that one or more of the many federal regulative statutes do not apply to their operations, or that they are complying with such regulative laws and desire to secure a judicial decision of the acts' applicability or assurance that they are in fact not violating the acts.

The question in all of these cases is substantially the same: Whether an employer who sells all of his production to a purchaser within the state of production, is subject to the regulatory power of Congress in the absence of any evidence (and in this case in the absence of any finding of fact), that there is in fact an interference with interstate commerce, either actually or potentially existing.

This controversy is now pending in the United States District Court of Idaho in reference to the Wage and Hour

law in a case wherein this petitioner is a party, viz: *Sunshine Mining Company vs. Carver,* 34 F. Supp. 274.

It is now pending in the United States District Court of Texas in the case of *Dupree v. Bay-Tex Oil Corporation,* 4 Wage and Hour Reporter 8, issue of January 6, 1941, in which case Judge Allred, in dismissing an employee's action under the Wage and Hour Act, said:

> "I further conclude that defendant Bay-Tex Oil Corporation in producing oil from its leases in San Patricio County, Texas, selling such oil in its tanks on said leases to Atlantic Pipe Line Company, thereupon parting with possession, ownership and control of such oil which became the exclusive property of and under the exclusive control of Atlantic Pipe Line Company, was not engaged in interstate commerce and would not, therefore, become subject to the provisions of the Fair Labor Standards Act of 1938, the sale and departure from possession and control of such oil by said Bay-Tex Oil Corporation, being a completed transaction entirely intrastate."

The dispute is now pending in the District Court of Montana in the case of *Graham vs. Lexington Mining Company,* Cause No. 213, in which case the mining company, believing that, under the decision of the Ninth Circuit in *National Labor Relations Board v. Idaho-Maryland Mines Corp.,* 98 F. (2d) 129, it was not subject to the act because it sold all of its product within the state where mined, had not paid its employees one and a half times their regular wage (which was many times larger than the statutory minimum) for hours worked in excess of forty-two hours a week, and is now being sued for fifteen or twenty thousand dollars pen-

alties.

This dispute is now current between the Idaho-Maryland Mine Corporation and the Wage and Hour Division, the claim being that the Idaho-Maryland decision is not controlling,—a contention similar to the contention of the National Labor Relations Board as set forth in its Fourth Annual Report dated January 3, 1940, at page 113 (quoted on page 24 of Petitioner's petition for certiorari).

The dispute is now current between mine operators in Colorado and both the National Labor Relations Board and Wage and Hour Division.

This question has been the subject of impartial discussion and wonderment by writers in law reviews. 39 *Columbia Law Review* 818, 834, 835.

Not only in the mining industry is this question vital: in agriculture it is rapidly becoming the difference between operation and non-operation. The administrator of the Wage and Hour Division, in performing the duty delegated to him by Congress to define the agricultural exemption exempting certain kinds of labor performed within the "area of production", has defined the "area of production" to be an establishment employing not more than seven or ten employees, located in the open country or in a town not to exceed 2,500 population, and all produce comes from a distance of less than 10 miles. Many of these concerns sell their entire production to a purchaser within the state of production. Are they, or are they not, subject to federal

regulation?

To the author's personal knowledge, innumerable questions and disputes similar to these are now pending, and many more are developing, in reference to both of these labor laws.

Uncertainty and confusion have arisen from the apparent conflict between this Court's decisions and the position taken by the Ninth Circuit Court of Appeals in the *Idaho-Maryland*, *Sunshine*, and *Sterling Electric Motors* cases. This uncertainty is causing industry an undue confusion and an intolerable expense, and is retarding its ability to increase production and employment.

Not only that, but this uncertainty is multiplying by many times the work of administrative agencies and the lower federal courts.

Industry believes that these wholly intrastate operations are without the federal regulating power. Their attorneys, after exhaustive study, are convinced that they are without federal regulatory jurisdiction. These men, after study of this court's opinions, and especially the later cases, are firmly of that opinion and belief.

This uncertainty and confusion cannot end until this court clearly and emphatically answers the question.

The administrative agencies take the position (and apparently are justified) that the *Sunshine* case in effect removes the *Idaho-Maryland* case from the books, and, in

the Ninth Circuit at least, it has done so. They recognize no limitation whatsoever upon the scope of their powers. Industry, with the same stubbornness (both, we believe, made stern by an abiding conviction of the correctness of their own conclusions), contends that there is a limitation, and that Judge Allred's opinion states that limitation.

This means, and can only mean, until this question is settled by this Court, that in one form or another, either by certiorari or civil appeal or criminal appeal, the same question will be presented time and time again to this court.

The terrific expense entailed in bringing these cases to this court, the enormous penalties that have been and will be assessed against industry because they believe they are without federal jurisdiction, and who believe they have a constitutional right to have the question decided, should be avoided.

Uncertainties such as this greatly retard recovery and production. It seems to Petitioner that the question is one of the greatest importance in the administration of all federal reguatory laws, and especially important in the administration of the National Labor Relations Act and the Wage and Hour Law.

It is doubly important in reference to the National Labor Relations Act. This for the reason that, by virtue of *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 48, there is no way an employer can have the question of the application of the Act to his operations decided until he has been

accused of unfair labor practices, had a hearing before the Board, awaited the intermediate report of the trial examiner, filed his exceptions to this report, argued or filed briefs, or both, with the Board; then await the order of the Board. In this case that process took just about one year.

The Board is empowered in its discretion (which means, in actual practice, every time) to order reinstatement *with back pay*. Until that moment the employer is prevented from getting any judicial decision upon the applicability of the act to him.

During all this time he has in good faith been contending that the administrative body did not have jurisdiction over him. Not until that moment does he know whether or not the Board actually claims that it has jurisdiction, but he is assessed a fine or penalty for not obeying an administrative regulative act which no one had ever held even applied to him.

As to every other regulative law, as to every other sort of administrative order, this Court has held that to thus assess a penalty was a deprivation of due process of law. As to a public service commission order in *Natural Gas Pipeline Co. v. Slattery*, 302 U. S. 300, 310; 82 L. ed. 276, 281, this court said:

> "As the Act imposes penalties of from $500 to $2000 a day for failure to comply with the *order*, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the *order* in the courts would be a denial

of due process, . . ." (Italics supplied)

But evidently (based entirely upon circuit court rulings, review of which has been denied by this court) that rule or principle of due process does not apply to acts or orders relating to labor.

The rule which must be deduced from the holding of the Ninth Circuit in this case, and this court's refusal to review is that an employer acts at his peril in resisting a Labor Board complaint, and acts at his peril in attempting to obtain a judicial review of the validity of a Labor Board order.

In deep and humble humility we respectfully suggest that the two questions advanced herein merit the attention of this court; that not only the proper administration of the Labor Act will be facilitated thereby, but also the general welfare of the country.

A perusal of the decisions of the lower courts, and particularly of the Ninth Circuit in this case, and the Fifth Circuit in *National Labor Relations Board v. Gulf Public Service Company*, decided January 9, 1941, shows that they have interpreted the constitutional power over commerce among the several states, and the terms of the statute to mean that every business concern which has "any" effect, or which in "any" manner obstructs, or in "any" manner burdens, or in "any" manner impairs the flow of interstate commerce, to be subject to the Congressional power and to the Board's jurisdiction. This tendency has gone so far that the Fifth circuit in the case just cited felt that it was

bound by reason of prior decisions to find interstate commerce, even though "taking cognizance of such disputes is drawing a fine bead at a gnat's heel, indeed is almost a *reductio ad absurdo*, a running of the Act, its policies and purposes, into the ground". Its conclusion was:

> ". . . . we must, upon the question of the power of the Board, construing the Act as it has been construed, hold that it extends to any and all enterprises without regard to their magnitude, in which labor troubles might reasonably be said to have the probable effect of directly interfering with the free flow of *any* interstate commerce." (Italics supplied)

This trend is strikingly shown by the decision of the Ninth Circuit in *National Labor Relations Board v. Sterling Electric Motors, Inc.*, 112 F. (2d) 63, at 67, where the court said:

> "In one of the earliest decisions after National Labor Relations Board v. Jones & Laughlin Steel Corp., 304 U. S. 1, this court, in Edwards v. United States, 91 F. (2d) 767-78, construed that decision as extending the Congressional power even to the planting in California of orange trees whose product is 'to be transported' in interstate commerce."

The statement in the *Edwards* case referred to was where the court said the interstate commerce power might be extended to "*the planting, maintenance or abandonment of citrus groves*". If these cases state the law in reference to the constitutional grant of the power over commerce between states, then the suggestion in 51 *Harvard Law Review*, p. 1123, that "the doubt now is whether there are any limits on the Board's jurisdiction in the industrial or commercial

sphere" is true.

It seems to petitioner, however, that if any such principle is to be established, that it should be established only by this court.

In view of our Federal system it is almost impossible to believe that such is the law. If it is, then, as stated by Chief Justice Hughes in writing the majority opinion in *Schechter v. United States*, 295 U. S. 495, 546, 97 A. L. R. 947, 966, a national integrated government is now an accomplished fact:

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace all the activities of the people and the authority of the state power over its domestic concerns would exist only by sufferance of the Federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to Federal control."

That a diminution of purchases by Sunshine Mining Company of materials and machinery which originate in states other than Idaho would be definitely indirect, has been held by this court in the same language in *Industrial Association v. United States*, 268 U. S. 64; *Levering & G. Co. v. Morin*, 289 U. S. 103; and in the *Schechter case*, supra, 547 in the following language:

> ". . . . for building is as essentially local as mining, manufacturing, or growing crops,—and if by resulting diminution of the commercial demands interstate trade was curtailed, either generally or in specific instances,

that was a fortuitous consequence, so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

This was not only the opinion of the unanimous court, but in a concurring opinion it was even exemplified further by Justices Cardozo and Stone. The quotation is definitely directed at the labor relations of a local business and in reference to a concern which purchases supplies coming directly from outside the state. The concurring opinion, p. 554, states:

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.

"Motion at the outer rim is communicated perceptibly, though minutely, in recording instruments at the center. A society such as ours 'is an elastic medium which transfers all tremors through its territory. The only question is of their size.'

"The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of forces that oppose and counteract them, there will be an end to our Federal System."

While we realize that the administration, in testifying before Congressional committees and in public statements, has definitely indicated that it is their opinion that the *Schechter* case has been overruled, yet this court has not so

stated. By reason of the cases hereafter referred to, we do not believe that it has been overruled, either directly or by implication, and should control this and all other similar cases until such time as this court definitely overrules the preceding authorities. Industry, and its attorneys, must assume that in view of the many quotations from, and approving citation of the Schechter case by this court, that it is still the law.

The House Committee in its Report of June 10, 1935 (Report No. 114) clearly stated what they intended by the language used in Sec. 2(7), which reads:

> "(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

The Committee said:

> "The new definition inserted by the committee amendment to subsection 7 also helps to confine the bill to the proper sphere under the *Schechter* decision by removing from its purview practices which merely 'affect' interstate commerce. Under this amendment the bill is confined to practices 'burdening or obstructing' interstate commerce. These words have received repeated recognition in court decisions as fit basis for Federal jurisdiction." Commerce Clearing House 1941 Labor Law Service, par. 1752, p. 1752.

In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 37, this court refers to burdens and obstructions which may be injurious to interstate commerce, and then states:

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." (Citing the Schechter case.)

Then states:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local, and create a completely centralized government. The question is necessarily one of degree."

In referring to the *Coronado* case the court at p. 90 stated:

> "And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employee's conduct."

This court, in *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466, continued the same principle of the constitutional limitation of federal power. It stated:

> "It is also clear that where federal control is sought to be exercised over activities which, separately considered, are intrastate, it must appear that there is a *close and substantial* relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still commerce

and not all commerce, but commerce with foreign nations and among the several states." (Italics supplied)

And:

"To express this essential distinction 'direct' has been contrasted with 'indirect', and what is 'remote' or 'distant' with what is 'close and substantial'. Whatever terminology is used, the criterion is necessarily one of degree and must be so defined."

And:

"The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a *close and substantial* relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceful adjustment of labor disputes." (Italics supplied)

It will be noticed that the requirement is a *direct and substantial* effect upon interstate commerce. This is saying in other language the same as was stated in the *Jones & Laughlin* case, *supra*, p. 32, in the following language:

"Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to Federal control and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise."

The lower court cases referred to above and the one sought here to be reviewed have removed entirely any requirement of a close and substantial effect, or a close and substantial relation. In *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 604, this court, carrying out the same

theory, added a requirement thereto, stating:

> "That those consequences may ensue from strikes of the employees of manufacturers who are not engaged in interstate commerce where the cessation of manufacture *necessarily* results in the cessation of the movement of the manufactured product in interstate commerce, has been repeatedly pointed out by this court." (Italics supplied)

The four cases from this court, just referred to, seemingly establish a principle, which principle, shortly stated, would seem to be: That, when attempting to exercise federal jurisdiction over an industrial activity or business which, when separately considered is local and intrastate, there must be found by the administrative body as a fact, based upon substantial evidence in the record, that a labor disturbance in such local activity would necessarily result in an immediate, direct and substantial diminution of the shipment of goods in interstate commerce, or an immediate, direct and substantial obstruction in the movement of goods or articles across state lines.

If this is a correct analysis of those four opinions, then the effect upon interstate commerce must be both direct and substantial. This not only is required by the constitution, we believe, but also by the statute. It refers to "materially affecting", "substantially burdening", "substantial obstruction", "substantially to impair". (Sec. 1) These two words "material" and "substantial" refer to something more than "any". They refer to something more than "slight". They mean considerable in amount or value or

the like. They carry forth the concept of importance. They certainly call for more than "any". Not only that, but from the use of the word "direct" as distinguished from "indirect" as used by the decisions, the doctrine of the Squibb case cannot be used to justify federal regulation.

We again call attention to the fact that the question raised here and in the first and second questions set forth in the petition for certiorari raises a question that must come up again and again until this court has definitely set a yardstick to apply to the intrastate operations where the production, sale and disposition of the product is all within the confines of one state. It is a question of immense importance in the administrative proceedings; extremely important because of the large, accumulating penalties which the Board imposes under the Act in the form of back wages, and the immense length of time that can occur between the alleged unfair labor practice and the order and findings of the Board, which in this case is practically eleven months, and the much longer time before a decision of a court is obtained. Here it was practically three years.

SECOND REASON FOR REHEARING

Upon the second question referred to herein, we ask the Court to consider the situation of an employer who is confronted with demands made under the alleged authority of the National Labor Relations Act. He does not believe he is subject to that Act, he is so advised by his attorneys—

he must seek advice from attorneys, there is no one else to whom to turn.

The attorney carefully and exhaustively examines into the employer's business and operations and into the decisions of this court. Then the attorney advises the employer—"It is my opinion that your operations are definitely intrastate, that you are not subject to the Act, but there is no way you can be sure, there is no way for you to find out. The Supreme Court in *Myers v. Bethlehem Shipbuilding Corporation,* 303 U. S. 41, 48-9, and in *Newport News S. & D. Co. v. Schauffler,* 303 U. S. 54, held that under Sec. 10(a) of the Act you cannot obtain a declaratory judgment establishing your liability or non-liability under the Act. The only way you can find out is by waiting until some one accuses you of an unfair labor practice; then wait until the Board elects to file a complaint against you; then go through a long and expensive hearing; wait until a trial examiner files an intermediate report; you must file exceptions thereto; must then either file briefs with the Board or pay the expenses of an attorney to go to Washington, D. C. to orally argue the facts to the Board, or both, and then wait until the Board enters an order. If the Board rules against you and holds that you are in interstate commerce, you may then appeal to the courts for an adjudication of the Act's applicability to you.

Now that would be all right, and would give you an adequate remedy from which you could obtain a definitive

adjudication. It will be extremely expensive, but if you can afford the expense I would advise you to do so.

But that is not all. If any men strike or quit or lose their employment, and the Board orders them reinstated, you may not only have to reinstate them, but will have to pay them back wages for work not performed from the time of the alleged unfair practices. And, as a year or more may elapse before the Board rules, the penalty which would be imposed upon you if the Act does apply might amount to millions of dollars."

Just what would the average employer do? He is given a Hobson's choice. He is presented with a dilemma, the horns of which are equally deplorable. He must either surrender his American right of a recourse to the courts, or he must gamble upon an attorney's opinion his entire business and financial solvency.

We submit that this is not equitable, not fair, and contrary to the entire history of American constitutional law as applied to regulatory laws. From *Wadley So. Ry. v. Georgia*, 235 U. S. 651, down to *Natural Gas Pipe Line Co. v. Slattery*, 302 U. S. 300, this court has held such a dilemma to be a deprival of due process of law. It was to avoid such a dilemma in reference to all other questions of civil law that Congress and most states passed the Declaratory Judgment law.

When Congress passed the National Labor Relations Act it certainly never had in mind that an employer could or

would be punished, fined and penalized for seeking a court review of the Board's order. This is clearly shown by the fact that the Federal Trade Commission Act was the model followed. *Amalgamated Utility Workers v. Consolidated Edison,* 309 U. S. 261. The Congressional Committees in reporting the Act told Congress that an employer could not and would not be penalized or injured until a court decision had been rendered.

In House Committee Report of June 10, 1935, Report No. 1147, Commerce Clearing House, Labor Law Service, (1941) Par. 5826, p. 5282, the Committee said:

> "It is intended here to give the party aggrieved a full, expeditious and exclusive method of review in one proceeding after a final order is made. Until such final order is made the party is not injured and cannot be heard to complain, as has been held in cases under the Federal Trade Commission Act."

Under the Federal Trade Commission Act no penalties accrue prior to the decision of the Federal Trade Commission. There are no accruing penalties. There are no mounting sums which will be a fine or penalty if the industry obeys the order upon the day it is issued. And certainly that is what this Court had in mind when it stated through Justice Brandeis in *Myers v. Bethlehem Shipbuilding Corporation,* 303 U. S. 41 at 48, where, after referring to the House Committee;

> ". . . . and until the Board's order has been affirmed by the appropriate circuit court of appeals, no penalty accrues for disobeying."

Certainly, neither Congress when it passed the Act, nor this court when it decided the *Myers* case, ever dreamed that the Board could levy a fine upon an employer which would accumulate to $300,000.00 before the employer even had a chance to obtain a judicial decision as to whether or not the Act even applied to him.

It seems clear that all parties understood that if an employer immediately obeyed the Board's order he would not be subject to pay a huge accumulating penalty.

A proper construction of the Act precludes the accumulation of a penalty prior to the rendition of the Board's order. This is shown by Sec. 10(g) and (h). These read as follows:

> "(g) The commencement of proceedings under subsection (e) or (f) of this section, shall not, unless specifically ordered by the court, operate as a stay of the Board's order.
>
> "(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as to modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

Under these subsections, and Sec. 10(a) as construed in the *Myers* case, under the Board's contention we have this peculiar situation. Prior to the Board entering an order no

court has jurisdiction. If the unfair labor practice was committed on July 1, 1937, and the Board did not rule until January 1, 1940, the Board could enter an order requiring the reinstatement of an employee with back pay from July 1, 1937, or for two and a half years. This penalty would become absolutely vested and beyond the jurisdiction or power of any court to affect (assuming jurisdiction and substantial evidence), but immediately upon January 2, 1940, the employer could file a petition for review with a circuit court and then that court could stay the accumulation of the penalty from that day until this court had ruled upon a petition for certiorari, which could take even longer.

Then, if this court affirmed, the situation would be: The employed would be fined, punished and penalized by the Board for all the time when the employer was prevented by the Act from seeking a judicial decision upon the Act's applicability to him, but not punished for the time it took to get that decision after the Board had ruled. *Retail Food Clerks, etc. v. Union Premier Food Stores,* 98 F. (2d) 821 (appeal to this court dismissed because case had become moot).

It is inconceivable that this could be a tenable construction or interpretation of the Act.

In view of the legislative history and Justice Brandeis' statements in the *Myers* case, and the plain, ordinary logic of the situation, it would seem that the proper construction of the Act would be that upon the Board's order being filed

the back pay order would take effect, and the back pay then commence to accumulate. The employer then has an available remedy. He can then file a petition for review and with it an application for an order staying the accumulation of the back pay order until the Circuit Court has ruled, and if a petition is filed for a writ of certiorari after an adverse ruling, he can again apply for a stay. He thus can then obtain his day in court, can be heard and if the court refuses a stay will then know the possible cost of litigating.

It would give the employer a chance to then reemploy the named men, a chance to agree with the Board without ruinous penalties. This opportunity would tend to reduce the appeals to the courts by removing a large part of the incentive.

This interpretation would not only seem to be in exact accordance with the statute, but also with the committee report, and would fit into this court's decisions in the following cases which, while cited in the petition at pages 42 and 43 and above, we list for the court's convenience:

Wadley So. Ry. v. Georgia, 235 U. S. 651, 661, 662-3;
Southwestern T. & T. Co. v. Danaker, 238 U. S. 482, 491;
St. Louis I. M. S. Ry. v. Williams, 251 U. S. 63, 64-5;
Oklahoma Operating Co. v. Love, 252 U. S. 331, 338;
Carter v. Carter Coal Co. (Justice Cardozo's dissent), 298 U. S. 238, 240-1;
Natural Gas Pipeline Co. v. Slattery, 302 U. S. 300, 310;
Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 48-9:
Sunshine Anthracite Co. v. Adkins, 310 U. S. 381, 464.

Such construction would be fair to all parties. The

Board can move just as fast or just as slow as it desires. *Amalgamated Utility Workers v. Consolidated Edison,* 309 U. S. 261. If it thinks the employer's practices are vicious it may file its complaint at once, have it set for hearing within five (5) days (Sec. 10(b)), its trial examiner could have his report out within a very few days, within twenty (20) days exceptions must be filed or the objections are waived (Rule 33, Code of Federal Regulations Sec. 202.33) and may within at least ten (10) days enter its order (Rules 32 and 34, Code of Federal Regulations, Sec. 202.32 and 202.34.) Thus, within not to exceed 60 days in an ordinary case, or 90 days at the most in almost any case, the Board may have its order entered and the fine, penalty and punishment accumulating, subject only to the power or jurisdiction of the Circuit Court under Section 10(g) and (h) to stay such accumulation.

It is fair to the employee and to the unions, for they may file their complaints of unfair labor practice at any time they so desire, and thus if they are found to be right by the Board, secure an early date for the commencement of the time when the penalties begin to accumulate.

But the employer is in no such enviable position. He cannot commence any proceedings to ascertain if he is either under the act or if he has been or is guilty of an unfair labor practice. He must sit back, absolutely helpless, and await the employees' or the Unions' grace. And as the Board claims that it can make the back pay commence accumulat-

ing at a date prior to the filing of an unfair labor practice charge, the employees or the Unions can increase the amount of possible penalty by delaying the filing of charges. Then the Board may take all of the time it desires between the filing of the charge and the filing of the complaint. It may be dilatory or prompt, as suits its convenience or whim. After the complaint is filed it may set it down for hearing at whatever date it chooses, as long as it is not sooner than five days. The hearing may be expedited or delayed, continued from time to time as it wishes. Its trial examiner can take all the time he wants, or that the Board allows him. There is nothing the employer can do.

After the exceptions are filed, the Board can hold a case for almost any length of time before entering its order. And if it orders reinstatement with back pay for a date six months prior to the filing of the unfair labor practice charge, the court must sustain it, if predicated upon substantial evidence, if the Board's construction of the Act is correct.

We realize that the Board has at all times insisted that the Act gave it this power, and that the lower courts have almost universally enforced such order, and that the position we are taking is contrary to language used by this court in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333 and in *Republic Steel Corp. v. National Labor Relations Board*, 85 L. ed. 1. The question here raised was apparently not raised in either case.

We believe, however, that the foregoing argument

demonstrates that either Petitioner was deprived of due process or that the Board, at least, committed an abuse of discretion in awarding back pay which commenced accumulating on August 18, 1937, by an order not entered until July 1, 1938.

This is not asking the Court to give every employer one free chance to violate the law, similar to the saying "Every dog is entitled to one bite".

If it were not for Sec. 10(a) the employer could secure a declaratory judgment as to the Act's applicability before being made subject to huge fines and penalties.

If such accruing penalties are valid and within the Act and do not constitute a deprival of due process of law, then, for much greater reason, the question of jurisdiction and the extent of the commerce power should be clearly and distinctly enunciated by this court.

We respectfully pray for a rehearing of the denial of petitioner's petition for a writ of certiorari.

Respectfully submitted,

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Yakima, Washington.

CHENEY & HUTCHESON
426 Miller Building
Yakima, Washington.

CERTIFICATE OF COUNSEL

STATE OF WASHINGTON }
COUNTY OF YAKIMA } ss

JOSEPH C. CHENEY, *being first duly sworn, on oath deposes and says:*

That he is the attorney for petitioner in charge of this case, and hereby certifies that in his judgment the above and foregoing petition is well founded, and especially certifies that it is not filed or interposed for purposes of delay.

JOSEPH C. CHENEY.

Subscribed and sworn to before me this 4th day of February, 1941.

JOHN GAVIN,
Notary Public for Washington,
residing at Yakima therein.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 352

SUNSHINE MINING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 3191–3227) is reported in 110 F. (2d) 780. The decision and order of the National Labor Relations Board (R. 211–258) are reported in 7 N. L. R. B. 1252.

JURISDICTION

The decree of the court below (R. 3228–3233) was entered on April 3, 1940, and confirmed on June 18, 1940, following a rehearing (R. 3235). The petition for a writ of certiorari was filed on August 21, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925,

and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED[1]

1. Whether the National Labor Relations Act is applicable to petitioner, a corporation engaged in mining in the State of Idaho, upon findings that it receives for use in its operations substantial quantities of materials from other States, and that it sells all of the ore concentrate which it produces to a nearby smeltering concern which in turn ships in interstate commerce all of the metals derived from the further processing of petitioner's ore concentrate.

2. Whether there was a variance between the allegations of the complaint and the finding of the Board as to what unit of petitioner's employees was appropriate for collective bargaining, and whether petitioner illegally refused to bargain with an organization of its employees.

3. Whether the back-pay provision of the Board's order violates the Fifth Amendment as imposing a penalty interfering with petitioner's right to litigate the question whether the Act is applicable to it.

4. Whether it was within the power of the Board upon findings that petitioner had refused to bargain collectively with a labor organization designated by a majority of the employees in an appropriate

[1] The Board opposes review of questions 1–4, inclusive, but does not oppose review of question 5.

unit, to require petitioner to bargain collectively with that organization, although the organization, due to petitioner's unfair labor practices, had lost its majority by the time of the hearing.

5. Whether, in the circumstances of this case, it was within the power of the Board, in requiring petitioner to bargain collectively, to order petitioner to embody any understanding reached in a signed written agreement.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. Supp. V, Sec. 151 *et seq.*) are set forth in the appendix to the petition, pages i–vii.

STATEMENT

Upon the usual proceedings had pursuant to Section 10 of the National Labor Relations Act,[1a] the Board, on July 27, 1938, issued its decision and order (R. 211–258). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

[1a] *I. e.*, amended charges filed by the International Union of Mine, Mill, and Smelter Workers, Locals 14 and 18 (R. 1–7); complaint (R. 82–96); answer (R. 26–51); hearing before a trial examiner, at which the Big Creek Industrial Union intervened; intermediate report of the trial examiner (R. 91–142); exceptions thereto by petitioner and the Big Creek Industrial Union (R. 142–202, 203–208); and oral argument before the Board.

[2] In the following statement, the references preceding the semicolons are to the Board's findings; those following ~~and~~ are to the supporting evidence.

Petitioner, a Washington corporation, maintains its principal place of business near Kellogg, Shoshone County, Idaho, where it is engaged in the mining and milling of silver ore (R. 217–218; 279, 283). Petitioner is the largest producer of silver in the United States (R. 218; 301, 303, 311–312); during 1936 it extracted and milled over 215,000 dry tons of ore, which yielded over 9,000,000 ounces of silver and lesser but substantial quantities of other metals [3] (R. 218; 282). During that year, 60 percent of the supplies, equipment, and electrical energy purchased by petitioner, at a cost of approximately $400,000, for use in its extractive and milling operations, moved to petitioner's premises from sources outside the State (R. 211; 1436–1443, 1451, 1456–1457).

After the ore is extracted from the mine, it is put through a process at petitioner's mill for removal of waste materials, and reduced to concentrate form (R. 218; 321–327). The concentrates are then shipped, pursuant to a long-term exclusive sales contract, to the Bunker Hill and Sullivan Smelter Company, hereinafter called the Smelter Company, located nearby in Shoshone County, Idaho (R. 218; 334–335). By the terms of the contract with the Smelter Company (R. 219–220; 365–380) petitioner agrees to sell and the Smelter Company to buy petitioner's total output

[3] The evidence shows that petitioner produced about 15 percent of the nation's total output of silver (R. 300, 303–304).

of ore concentrates (R. 219; 365–366); petitioner agrees to pay the Smelter Company a basic treatment charge for the further processing of the concentrates (R. 219; 372), and the Smelter Company agrees to pay petitioner 75 percent of the market value of the concentrates at the time of sampling and assaying, and the balance of 25 percent thirty days from the date of sampling (R. 219–220; 368–369, 374, 377).[4]

Upon delivery to the Smelter Company the silver concentrates are remilled, and are then commingled with concentrates from other mines, and subjected to a smelting treatment (R. 218–219; 1947, 1952–1954). The silver bullion in bar form is shipped by the Smelter Company to the United States Mint at San Francisco, California (R. 219; 30, 335–336, 351, 416–417, 1955), and the gold bullion to a Government depository at Seattle, Washington (R. 219; 359, 1956). The copper and lead are sold in the open market and shipped to various concerns throughout the nation (R. 219; 30, 272, 343–344, 347, 355–356, 1921).

In January 1937 the International Union of Mine, Mill, and Smelter Workers, Locals 14 and 18, hereafter called the Union, which is affiliated with the C. I. O., began an organizing campaign in the Coeur d'Alene mining area, in which peti-

[4] As the price of gold and silver are fixed by government decree, the Smelter Company probably disposes of these metals as soon as possible (R. 219). The Government affords a ready and unlimited market.

tioner's mine is located, and successfully negotiated a written contract on behalf of the employees of the Federal Mining Company (R. 222; 414–415, 418–419). Petitioner attempted to defeat the Union's membership drive among its employees by a company-sponsored petition and election (R. 222–227, 2611, 2766). The petitions, pledging its signatories to disregard any "strike," "labor holiday" or "picket line" unless sanctioned by "a majority vote at a secret poll among all employees" (R. 222–223; 142–157, 529), were drafted and circulated among the employees on June 23 and 24, 1937, with the active aid of petitioner's foremen and supervisory staff (R. 223, 285–286; 661, 727, 787, 856, 863–864, 873–874, 1117, 1161–1162, 1238–1239, 1340–1341, 2085–2086, 2309, 2312, 2394, 2449, 2611–2612). The election, held on June 24, was conducted on the following resolution, to which a "yes" or "no" answer was required (R. 224–225; 733):

> *Resolved,* That we as Sunshine employees, want no outside interference in our relations with the Sunshine Mining Company, at this time.
>
> That we will not respect any labor holiday, strike, or picket line unless a majority of all of the Sunshine employees vote for it by secret ballot.

The voting booth was constructed at petitioner's expense (R. 224; 856–857); its foremen joined in urging the employees to cast their ballots (R. 224;

846, 857, 1341–1342, 1377–1378, 2834–2835); Graham, general foreman, was on the scene throughout the voting (R. 224; 2834); and eligibility to vote was determined by petitioner's timekeeper (R. 224; 499, 743, 794, 1124). During this period supervisors of petitioner made remarks to various employees derogatory to the Union or to the C. I. O. (R. 226–227; 2308–2309, 2313–2316, 2683, 2686). On June 26, petitioner posted at the mine a statement of labor policy, advising the employees, among other things, that petitioner would "bargain collectively with groups or organizations" only "to the extent of their membership" (R. 233; 33, 48–51, 427–430).

Notwithstanding petitioner's efforts, the Union campaign continued with success. On June 28, 1937, the Union represented a majority of petitioner's employees in a unit appropriate for collective bargaining purposes.[5] On that date, representatives of petitioner and the Union met in the first of three meetings (R. 233–234; 434–435, 436,

[5] The Board found that the mine and mill employees of petitioner, excluding supervisory, clerical, and technical employees—constituted an appropriate unit for collective bargaining; and that on June 28, July 9, and August 2 and thereafter a majority of the employees composing this unit had designated the Union as their representative for collective bargaining with petitioner (R. 227–233; 85, 124–130, 142, 187–189, 229–230, 232, 602–649, 661, 664–665, 667, 670–679, 896–899, 908, 910, 938–980, 980–981, 989, 995–1033, 1034–1044, 1061–1062, 1063–1081, 1082, 1158–1159, 2143–2144, 2434–2435, 2556–2557, 2558–2560).

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2859–2860). Acting as spokesman for the Union, McGuire, the Union's organizer and business agent, advised Leisk, general manager for petitioner, that the Union represented a majority of the employees (R. 234; 2867–2868). McGuire then submitted copies of a proposed trade agreement, embodying a request of the Union for recognition as the sole collective bargaining agency for petitioner's employees (R. 234; 432, 436, 448–452, 465–466, 2860). Leisk informed the Union representatives that he doubted the Union's majority status,[6] but declined to discuss the question of exclusive recognition on the ground that the posted statement of policy set forth petitioner's position in that respect (*i. e.*, that it would bargain with groups of employees only to the extent of their membership) (R. 234; 2861, 2871).

The second conference, on July 9, brought no relaxation of petitioner's stand. General Manager Leisk declared that petitioner would not enter into a written contract with the Union even if it represented 95 percent of the employees, and that petitioner would deal with the Union only to the extent of its membership (R. 235–236; 2874–2875; 2925).

On August 1, following a strike vote, the Union called a strike and established a picket line near the mine (R. 236; 272, 454–455, 477, 735, 747). A third

[6] Leisk refused McGuire's offer to submit the question of majority representation to the Board for determination, on the ground that the Board had no jurisdiction over petitioner (R. 234; 437).

and final conference was held on the following day, but Leisk stated that petitioner's position was unchanged (R. 236–237, 490–492, 2879–2881).

The Board found that petitioner, by its refusals to accord to the Union exclusive bargaining rights and by its refusal to embody understanding, if reached, in a signed agreement, had violated Section 8 (5) of the Act; further, that petitioner's unlawful refusal to bargain caused the strike of its employees commencing on August 2, 1937 (R. 237).

Petitioner sought to break the strike by various steps calculated to intimidate the employees. While the Union's strike vote was being taken the "Committee of 356" appeared on the scene as an organization of employees opposed to the strike; its first meeting was launched by an employee named Higgins at a boarding house on petitioner's premises (R. 238; 1855, 1733, 2879). Higgins was succeeded as chairman by an employee named Best, who appointed Higgins and an employee named Kulm as his assistants (R. 238; 1669–1670, 1729, 1857). On July 31, a notice over the signature of Best was posted on the company bulletin board, which "called" all of the employees "interested in their jobs" to a mass meeting to be held on August 1 (R. 238; 925–926). A foreman of petitioner commissioned an employee to stand guard over the notice (R. 238, 927–928). At the August 1 meeting of the Committee of 356, also held at the boarding house, an official of petitioner addressed the employees and arranged for their transportation

through the picket line (R. 238; 1126–1134, 1697, 1720, 1721, 1733–1734, 1742).

At the inception of the strike on the morning of August 2, petitioner delegated to the Committee of 356 the conduct of all matters pertaining to the strike, including the policing of the mine and the task of getting the employees through the picket line (R. 239; 1611, 1617–1621, 1750, 1789, 1863–1867). Best, Higgins, and Kulm were given the use of petitioner's office facilities, as well as a company car (R. 239; 1621–1622, 1743–1744, 2988). They were joined by a publicity expert procured by petitioner, who assisted in the promotion of a comprehensive publicity campaign designed to influence public opinion and break the morale of the strikers and pickets (R. 239; 1674, 1675, 1679, 1690–1691, 1695–1696, 1698–1699, 1708, 1713, 1867).

On August 4 over 200 telegrams signed by employees were sent to the Governor of Idaho, requesting militia protection against the strikers, who were said, falsely, to be getting out of hand (R. 239–240; 284, 318–319, 1469, 1562, 1594, 1788, 1784, 1787, 1891–1892, 2009–2010, 2047–2048, 2242–2251–2252). Petitioner financed, and was responsible for, these telegrams, in an effort to obtain a show of military force to break the strike (R. 239–240; 1536–1540, 1549–1552, 1553, 1601–1604). Soon after the strike was called John Kitkowski, petitioner's machine shop supervisor, formed an organization of Vigilantes, whose avowed purpose

was to "break the C. I. O." and to "take care of any radical organizing the mines" (R. 240; 318–319, 1159, 1239–1243, 1249–1250, 1469, 1473, 1475–1476, 1480, 2860).

Arrangements for a mass demonstration against the strikers were made by petitioner (R. 240; 1680–1681). Kitkowski supervised the preparation and widespread distribution of Vigilante buttons and handbills, warning that "Vigilantes are ready to take care of any radical organizers. * * * Ropes are ready" (R. 240–241; 893, 1476–1478). Through Best and the Committee of 356, petitioner issued a challenge to the strikers to appear at the mine on August 8 "in military formation" and face the assembled employees of petitioner and other mines in the area (R. 241; 1355, 1681–1684, 1686–1687). About 10,000 handbills announcing the projected assemblage were distributed (R. 241, 243; 1355, 1688). On August 7, the strikers were warned by a State law enforcement officer, who was attempting mediation, that the strike was lost, since the planned demonstration could not be checked (R. 241–242; 922, 1151, 1185, 1187–1189, 1204, 1270, 1284, 1285, 1320). The strikers capitulated, and the picket line was withdrawn (R. 241–242).

Petitioner thereupon converted the scheduled demonstration into a victory celebration. Its high officials addressed the crowd of 2,000 in a strongly antiunion vein (R. 242; 1291, 1302–1303, 1888, 2667). The employees were given a holiday with

pay and were supplied with free beer (R. 242; 318, 1165, 1687–1688, 1699, 1702–1703, 1704, 1708–1709, 1710–1712, 1871–1872, 2735). During the celebration that followed, one group paraded to the C. I. O. headquarters and carried away its sign, while another threatened a Union employee with death, and drove him from the district (R. 242; 318, 319, 1206–1219, 1352–1353, 1708–1709, 2735).

After the discontinuance of the picket line, some 60 strikers applied for reinstatement (R. 243–247; 1243, 1309). They were referred to the Committee of 356, to which petitioner had delegated authority to pass upon reinstatement (R. 244; 795, 838, 849, 870, 884, 1276, 1281–1282, 1324, 1370–1371, 1376, 1380–1381, 1410, 1622, 1744). Applicants who had served on the picket line were denied reinstatement; nonpicketing strikers were reinstated (R. 244; 1208, 1216, 1309, 1312, 1367, 1500–1502, 1506, 1511–1512, 1528, 1744, 1752–1755, 1805, 1876, 1877, 1889).

Finally, in order to consolidate its antiunion gains, petitioner, acting through Best, the chairman of the Committee of 356, formed and dominated the Big Creek Industrial Union (R. 249–251; 3015). Best and his aides planned and supervised each step in the formation and launching of the Big Creek Union, which proved impotent as a collective-bargaining medium (R. 250–251; 1763–1766, 1767, 1769–1770, 1880, 2262–2263, 2965, 2966–2967, 2967–2968, 2972, 2979–2985, 2990–2991, 3003, 3014–3015, 3016).

The Board found that, by the foregoing acts, petitioner had engaged in unfair-labor practices within the meaning of Section 8 (1), (2), (3), and (5) of the Act (R. 227, 233, 237, 243, 247, 251). The Board ordered petitioner to cease and desist from these unfair practices; to bargain collectively with the Union and to embody any understandings reached in a signed agreement; to offer reinstatement to all employees who went on strike on August 2, with back pay from August 18, the date of the discrimination against them; to withdraw recognition from and disestablish the Big Creek Union; and to post appropriate notices (R. 255–258).

On April 15, 1939, the Board filed in the court below a petition for enforcement of its order (R. 265–271). On April 3, 1940, the court handed down its decision and entered its decree enforcing the Board's order in full, save for a minor modification requested by the Board (R. 3190–3233). On June 18, 1940, after a rehearing limited to a single issue, the decree was affirmed in all respects (R. 3234–3235).

ARGUMENT

The Board does not oppose the granting of a writ limited to the "signed contract provision." See *infra* pp. 23–25. We respectfully submit, however, that none of the numerous other questions urged by petitioner warrants review.

1. *Jurisdiction of the Board.*—The facts as to petitioner's business are not in substantial dispute. The evidence reviewed in the Statement, *supra,* pp. 4–5, shows that petitioner's ore and concentrates proceed in a continuous flow of enormous volume from petitioner's mine and mill through the refining plant of the Smelter Company and thence to out-of-State destinations.[7] These facts establish the applicability of the Act to petitioner, since they leave no doubt of the disruptive effect upon the flow of interstate commerce that would result from a stoppage of petitioner's operations by industrial strife. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 41; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197; *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601; *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 60 S. Ct. 918. The factor, which petitioner stresses (Pet. 17–21), that between the time its products are mined and the time they enter the avenues of interstate commerce they are purchased and processed

[7] Since the total output of the Smelter Company is admittedly shipped to out-of-State destinations (R. 30), it is difficult to see what support for its contention petitioner draws from the fact, which it emphasizes, that the Smelter Company commingles the concentrates secured from petitioner with those from other sources, so that the origin of any particular lot of refined metal cannot be determined.

More than one-half of the Smelter Company's total output of metal is refined from petitioner's concentrates (R. 335–336, 356–358).

by another concern, does not alter the direct dependence of the interstate shipments upon petitioner's mining and milling operations. In the *Consolidated Edison*, *Fainblatt*, and *Bradford Dyeing* cases, this Court held that enterprises conducted within State lines were subject to the Act, since it was apparent that an interruption in the operation of these enterprises by industrial strife would directly and immediately impair the interstate operations of their customers.[8]

The decision below is not, as petitioner contends (Pet. 29; Br. 15–16), in conflict with the prior decision of the same court in *National Labor Rela-*

[8] There is no basis for petitioner's claim (Pet. 3, 29; Br. 4) that the Board failed to make sufficiently explicit findings of fact with respect to the effect upon interstate commerce of a stoppage of petitioner's operations. The Board found that "the operations of the respondent [petitioner] and the Bunker Hill Company [the Smelter Company] together constitute a direct and continuous flow of commerce across State lines to the mint and the market" (R. 221), and that "the activities of the respondent [petitioner] * * * occurring in connection with the operations of the respondent [petitioner] * * * have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce" (R. 251). These findings were based upon detailed subsidiary findings as to the "essential basic facts" of petitioner's business (R. 217–221); and obviously comply with the requirements laid down in *Atchison, Topeka and Santa Fe R. Co.* v. *United States*, 295 U. S. 193, 202; *Florida* v. *United States*, 282 U. S. 194; and the other cases upon which petitioner relies.

tions Board v. *Idaho-Maryland Mines Corp.*, 98 F. (2d) 129. In the present case the court below expressly distinguished the *Idaho-Maryland Mines case*—wherein the gold and silver mined in California by the employer were sold and shipped by it to a United States mint, or to a refinery, both of which were located in California—on the ground that it there viewed the subsequent out-of-State shipments made by the United States "not as commercial transactions, but as administrative acts of government (R. 3197–3198)."[9]

2. *The bargaining unit.*—Petitioner asserts that there was a variance between the complaint and

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[9] The jurisdiction of the Board likewise may be rested upon the proof that petitioner purchases and receives in interstate commerce supplies, equipment, and energy having an annual value of nearly $400,000. (R. 1436–1451, 1456–1457.) The supplies and equipment move regularly to petitioner's mine and mill each month (R. 1436–1443). The court below noted these facts (R. 3194, 3198).

The various circuit courts of appeals have drawn no distinction between incoming commerce and outgoing commerce in applying the jurisdictional test laid down in the *Jones & Laughlin* and other decisions of this Court, and have uniformly held the Act applicable to protect a flow of materials into the State. *Newport News Shipbuilding Co.* v. *National Labor Relations Board*, 101 F. (2d) 841, 843 (C. C. A. 4), affirmed, 308 U. S. 241; *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951, 954 (C. C. A. 4); *National Labor Relations Board* v. *Norfolk Shipbuilding and Dry Dock Corp.*, 109 F. (2d) 128, 129 (C. C. A. 4); *Consumers Power Co.* v. *National Labor Relations Board*, decided June 27, 1940 (C. C. A. 6); *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539, 542–543 (C. C. A. 10).

the Board's finding as to what unit of employees was appropriate for collective bargaining, with the result that petitioner was unconstitutionally denied a hearing on the question whether the Union represented a majority of the employees in the unit found by the Board to be appropriate, and with the further result that there is no evidence in the record on that question (Pet. 3, 9–17, 29–34). Petitioner's argument is that the unit alleged in the complaint (R. 85) consisted of "all" of the employees with the exception of those employed in a supervisory, clerical, or technical capacity, and that the Board in its decision narrowed the appropriate unit to include only "mine and mill" employees (excepting also the categories excluded in the complaint), thus leaving outside the unit workers in other classifications, such as those employed in the machine or electrical shops.

It is perfectly clear that the unit alleged in the complaint and that found by the Board are identical.[10] The complaint alleged (R. 85):

> The mining and milling operation is closely integrated, and all the employees of the respondent with the exception of supervisory officials, executives, technicians, of-

[10] Petitioner's argument, though pressed in the court below, was not noticed in the opinion, unless by the following statement (R. 3213): "The complaint alleged that the mine and mill employees of respondent, excluding supervisory, clerical, and technical employees, constituted an appropriate unit for collective bargaining, and the Board so determined."

> fice employees, and employees working in the boarding and rooming establishment conducted by the respondent on the mining premises constitute a unit appropriate for the purposes of collective bargaining * * *.

The Board's decision reads (R. 228):

> We find that the respondent's mine and mill employees, excluding supervisory, clerical, and technical employees, constitute a unit appropriate for the purposes of collective bargaining * * *.

While there is thus a slight difference in phraseology between complaint and finding, the context of the Board's decision plainly reveals that the phrase "mine and mill employees" was employed merely as meaning all employees other than supervisory, office, or technical employees.[11] In its

[11] The paragraphs of the Board's decision immediately preceding the quotation above, read (R. 227–228):

"It is alleged in the complaint that the respondent's name mine and mill employees, excluding supervisory, clerical, and technical employees, constitute a unit appropriate for the purposes of collective bargaining. The respondent urged that the appropriate bargaining unit should include office and technical employees.

"It is clear from the discussion in Section I above concerning the respondent's business that the operations of the mine and mill are closely integrated. The mine and mill employees are paid on a daily or shift basis, while office and technical employees are paid on a regular salary basis. The respondent itself recognizes that a distinction exists between the mill and mine employees and the clerical and technical employees by carrying them on separate pay rolls. The unit advocated by the Union and alleged in the complaint as ap-

decision, the Board specifically stated that it was adopting the unit set forth in the complaint, and the Board used that unit as the basis of its computations in determining whether the Union represented a majority (R. 229, *supra,* p. 7). Moreover, if the Board had intended to include only the employees working underground in the mine or within the confines of the mill itself, there would have been no reason for it to specify the exclusion of clerical and technical employees.

Intermingled with its claim of a variance between complaint and finding as to the appropriate unit, petitioner contends that the Union, in its attempt to bargain with petitioner, claimed to represent "all" the employees, whereas it admittedly did not represent a majority of all employees including office and technical employees, and that it was therefore proper for petitioner to refuse to bargain with the Union. This contention is of a part with petitioner's claim of a variance. On June 26, 1937, two days before the Union's first bargaining overtures were made, petitioner had posted a statement of labor policy, declaring that it would bargain with organizations only "to the extent of their membership" (*supra,* p. 7). When the Union on June 28 sought recognition as the bargaining agent

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propriate is one which has prevailed in the industry for many years, and which we have found under similar circumstances to be appropriate. The evidence does not disclose any reason for departing from the unit claimed by the Union."

for "all" employees, it was seeking only to avoid the unlawful restriction petitioner had imposed and to bargain for non-union employees as well as its members. Petitioner evidently so understood at the time, since it raised no questions as to the appropriateness of the unit for which the Union sought to bargain, but instead, as the court below emphasized (R. 3215), merely reaffirmed its declaration of policy (*supra*, p. 8).[12]

Petitioner's claims of variance and failure of proof are similar to and as unsubstantial as those rejected in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 349–351.

3. *The back pay award.*—The Board's order awards back pay to those of petitioner's striking employees who were not reinstated following the strike, the back pay to run from August 18, 1937, the date of petitioner's unlawful discrimination in reinstatement of the strikers (see *supra*, pp. 12). Petitioner urges that the back pay award violates the Fifth Amendment, as imposing a cumulative penalty interfering with petitioner's right to litigate the question whether the Act is applicable to it (Pet. 4–5, 41–44). An identical contention was unsuccessfully urged in the petition for certiorari

[12] At the hearing before the trial examiner, petitioner's president, R. M. Hardy, summarized its position, stating "We would recognize the Union to the extent of their membership," but "refused to take them as the sole bargaining agency" (R. 1623).

in *Carlisle Lumber Co.* v. *National Labor Relations Board,* 94 F. (2d) 138 (C. C. A. 9), certiorari denied, 304 U. S. 575, and is answered in the brief in opposition filed in that case, to which the Court is respectfully referred.

4. *The order to bargain.*—Petitioner attacks the provisions of the Board's order directing it to bargain with the Union on the ground that, whether or not the Union represented a majority of the employees at the time of the refusal to bargain, it had lost its majority to the Big Creek Industrial Union the time of the hearing (Pet. 5, 44–46). This contention is squarely foreclosed against petitioner by the decision of this Court in *National Labor Relations Board* v. *Bradford Dyeing Ass'n.,* 60 S. Ct. 918. There, as here, the asserted repudiation of the outside union and the selection of the company-dominated organization was a direct consequence of a variety of flagrant unfair labor practices,[13] which, the Court held, could not operate to change the freely chosen bargaining representative. 60 S. Ct., at 929. Accordingly, the Board was fully justified in ignoring the purported designation of the Big Creek Industrial Union and in issuing an order to bargain with the Union, premised upon the

[13] Petitioner's statement (Pet. 45) that "it is stipulated" the men freely and voluntarily joined the Big Creek Union is misleading. The stipulation to which petitioner refers (R. 2126–2127) was to the effect that a number of the employees would so testify.

continued free designation of the Union by a majority of the employees but for the unfair practices.

Petitioner further argues that, in any event, the lapse of time since the hearing requires that enforcement of the bargaining order be conditioned upon an election, and that in not so holding the decision of the court below conflicts with decisions of other Circuit Courts of Appeals (Pet. 46–48). But at final hearing in the lower court petitioner's sole contention in this regard was the one considered above, that the Union's majority had been lost to the Big Creek Industrial Union by the time of the hearing; upon this ground petitioner objected to any enforcement of the bargaining order.[14] It was not until the lower court's decision came down, upholding the bargaining order over this objection, that petitioner, in a voluminous petition for rehearing, advanced the additional and different claim now asserted, that enforcement of the bargaining order should be conditioned upon an election because of the lapse of time subsequent to the hearing.[15] That the court below did not deem this belated objection to be properly before it, or con-

[14] "Brief for the Sunshine Mining Company," No. 9162, pp. 82–83, 84.

[15] "Petition for Rehearing of Respondent, Sunshine Mining Co.," No. 9162, pp. 25–31. This document totalled 91 printed pages, 6 pages more than petitioner's main brief upon final hearing.

sider or pass upon it, is plainly suggested by the fact that the rehearing granted was limited to the single issue of the propriety of the back-pay order (R. 3233–3234). In these circumstances, it would seem that petitioner may not urge the contention in this Court. In any event no clear case of conflict of decisions can be made out.

5. *The signed contract provision.*—The Board found that petitioner had refused to bargain with the Union, in violation of the Act, (a) by refusing to award the Union exclusive bargaining rights, and [16] (b) by refusing to embody understandings, if reached, in a written signed agreement (R. 237). The Board, in ordering petitioner to bargain collectively with the Union, required it to embody any understandings which might be reached in a signed written agreement, if requested to do so by the Union (R. 257).

The court below unanimously upheld this provision of the Board's order, as affirmative relief within the power of the Board in the circumstances of this case (R. 3226, 3227). One of the judges

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[16] The ample evidence heretofore referred to (*supra*, pp. 8–9), consisting in part of admissions by petitioner's officials, that petitioner declined to grant the Union exclusive recognition as required by Sections 8 (5) and 9 (a), dispose of petitioner's contention that there is lack of evidenciary support for the Board's finding that it refused to bargain collectively.

agreed with the Board that petitioner's refusal to enter into a signed written agreement was an unfair labor practice under the Act (R. 3210–3212); the other two judges held that the question was not before the court, and expressed no opinion on it (R. 3226, 3227).

On the question of the Board's affirmative power, the decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *M. H. Ritzwoller Co.* v. *National Labor Relations Board,* decided May 8, 1940. In the *Ritzwoller* case the Board did not pass upon the question whether a refusal to sign a contract, after an agreement had been reached, was a refusal to bargain, but, upon findings of violation of Section 8 (5) in other respects, directed the employer to bargain and reduce understandings, if reached, to a written agreement (15 N. L. R. B. 15, 24–27, 31, 35). The Seventh Circuit upheld the Board's findings of unfair labor practices, but refused to enforce the written-agreement provision of the order.[17]

Further, it appears that both of the foregoing aspects of the written-agreement question are pre-

[17] The decision below is not in conflict on this point with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, as petitioner contends (Pet. 49). There is no suggestion in the opinion of the court below that the Act compels the reaching of any agreement.

sented for disposition by this Court,[18] in *H. J. Heinz Co.* v. *National Labor Relations Board,* certiorari granted June 3, 1940, No. 73, present Term.

Accordingly, because of the conflict noted, and because the question is before the Court in the *Heinz* case, the Board does not oppose the granting of a writ on this question. If review is granted, however, it is submitted that it should be limited to the "written agreement" issue, on which conflict exists, and that the order of the Court should provide that it shall not operate to suspend enforcement of the other provisions of the decree below, which are clearly separable. Cf. *Republic Steel Corp.* v. *National Labor Relations Board,* certiorari granted May 20, 1940, No. 707, last Term. Here, as in the *Republic Steel* case, the Board's order is designed to remove the serious economic dislocation produced by petitioner's flagrant and sweeping violations of the Act, which affect a great

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[18] In the *Heinz* case, the Sixth Circuit said (110 F. (2d) at 849):

"We * * * approve the Board's conclusion that respondent violated § 8 (5) by not embodying the understandings reached in a signed agreement.

"However, if the view of the Seventh Circuit be accepted, it does not follow that the Board's order is invalid. We are of the opinion that the order is more obviously justified by § 10 (c), which requires the Board, when it has found an employer guilty of an unfair labor practice, to serve an order 'requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, * * * as will effectuate the policies of this chapter.'"

number of employees and have gone unremedied since August 1937.

CONCLUSION

We do not oppose review limited to the "written agreement" question, upon which alone a conflict exists. The petition presents no other substantial question of public importance.

Respectfully submitted.

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